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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

UNITED STATES OF AMERICA,

*Petitioner,*

v.

CANNELTON SEWER PIPE COMPANY,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

## APPENDIX II TO BRIEF FOR THE RESPONDENT

Part A: Discussion of Treatment Processes

Part B: Cases

Part C: Legislative Materials

Part D: Miscellaneous Materials

Part E: Chart of Cases Applying the Commercially Market-  
able Products Rule

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## APPENDIX II

### Part A: Discussion of Treatment Processes

#### 1.

**Analysis of the Government's Theories of Restricted Classification of "Ordinary Treatment Processes" Under Code Section 114(b)(4)(B)**

a. *The Government's attempt to restrict "ordinary treatment processes" within the meaning of Section 114(b)(4)(B) to "mineral dressing" processes for separation of the valuable constituent from waste is unsound.*

In the first place, there is no basis for the Government's suggestion that in the mining industry "treatment" is merely a synonym for "mineral dressing," a technical term relating to the separation of the valuable constituent from waste matter. For this, the Government cites two authorities, neither of which supports the idea. One is Taggart's use in his *Handbook of Mineral Dressing* of the headings "Methods of Treatment" and "Treatment" to describe the processing of various minerals, including ore and mineral dressing. (Gov't Br. 32 n.25) Taggart obviously does not confine the term "treatment" to mineral dressing, and in fact he includes a description of the processing of common clay and fire clay into brick and tile under the heading "Treatment" in his discussion of "Clay."<sup>1</sup> The other authority cited by the Government is Fay's *Glossary of the Mining and Mineral*

<sup>1</sup> TAGGART, HANDBOOK OF MINERAL DRESSING, 3-13 through 3-15 (1945 ed.) (reprinted p. 170 *infra*).

*Industry*, which according to the Government's brief (p. 32 n.25) contains a statement "to the effect that a treatment process in mining means a process 'whereby the valuable constituent is recovered.'" Actually, Fay defines "treatment" in *metallurgy*, not *mining*, as "the reduction of ores by any process whereby the valuable constituent is recovered."<sup>2</sup> That is the only kind of process involved in metallurgy as defined in the same *Glossary*, i.e., the "science and art of preparing metals for use from their ores by separating them from mechanical mixture and chemical combination."<sup>3</sup>

In the second place, the processes specifically listed in the statute as included in "ordinary treatment processes" include processes which do not involve separating the valuable constituent from waste matter. Many of the listed processes are of such character, as would be expected, since such processes are necessary to obtain a marketable product from almost all metallic ores. However, the statutory definition of mining as adopted in 1943 expressly included in "ordinary treatment processes" a number of other processes which clearly are not processes for separating the valuable constituent from waste matter—for example, sizing coal and loading it for shipment, sintering iron ore and loading it for shipment, and cooling and breaking sulphur and loading it for shipment. Other processes not of that character were added to the list of included processes when the Internal Revenue Code of 1954

<sup>2</sup> FAY, A GLOSSARY OF THE MINING AND MINERAL INDUSTRY 699 (U. S. Bureau of Mines, Dep't of Interior, 1947).

<sup>3</sup> FAY, *op. cit. supra* note 2, at 431.

was adopted—i.e., the processing of coal to allay dust and prevent freezing, the pulverization of talc, and the sintering and nodulizing of phosphate rock.<sup>4</sup>

The Government recognizes that the listing by Congress of such processes as included in “ordinary treatment processes” refutes any contention that “ordinary treatment processes” were intended to be restricted to mineral dressing involving separation of the valuable constituent from waste matter. It concedes that putting minerals in “shipping grade or form may require, in some instances, such preparatory processes as crushing, screening, or drying” (Gov’t Br. 9, 33), and it proceeds to another classification theory.

*B. The Government’s attempt to restrict “ordinary treatment processes” within the meaning of Section 114(b)(4)(B) to processes which are not “manufacturing” processes is also unsound.*

The Government’s ultimate theory of classification of the processes to which it contends “ordinary treatment processes” are restricted is on the basis of a distinction between mining processes, which it says “do not destroy the physical and chemical identity of the minerals” (Gov’t Br. 9), and manufacturing processes, which it says “involve the mechanical or chemical transformation of inorganic and organic substances into new products.” (Gov’t Br. 9)

This attempted classification is also refuted by the processes listed in the statute as included in “ordinary

<sup>4</sup> INT. REV. CODE OF 1954, § 613(c)(4)(A), (E) (p. 114 *infra*).

treatment processes." Many of the processes specifically included by the statute involve chemical changes and therefore are manufacturing processes under the Government's suggested distinction. For example, chemical changes are effected by such processes as flotation,<sup>5</sup> amalgamation,<sup>6</sup> cyanidation,<sup>7</sup> leaching,<sup>8</sup> precipitation,<sup>9</sup> and the furnacing of quicksilver ores.<sup>10</sup> All these processes are specifically included as "ordinary treatment processes" by clause (iv) of Section 114(b)(4)(B). The outstanding authority on the subject of mineral dressing considers that every mineral dressing process, whether it involves methods of separation which do not effect substantial chemical changes ("ore dressing") or utilizes chemical reaction for separation of the constituents ("extractive metallurgy"), "is to be looked upon primarily as a manu-

<sup>5</sup> TAGGART, *op. cit. supra* note 1, at 12-03, 12-04, 12-84; RICHARDS & LOCKE, *TEXTBOOK OF ORE DRESSING* 235-36 (3d ed. 1940).

<sup>6</sup> TAGGART, *op. cit. supra* note 1, at 14-11; GAUDIN, *PRINCIPLES OF MINERAL DRESSING* 473 (1939).

<sup>7</sup> 6 *ENCYCLOPEDIA BRITANNICA*, *Cyanide Process* 914 (1956 ed.); NEWTON, *INTRODUCTION TO METALLURGY* 567-68 (2d ed. 1947); STOUGHTON & BUTTS, *ENGINEERING METALLURGY* 347 (1926).

<sup>8</sup> LIDDELL & DOAN, *THE PRINCIPLES OF METALLURGY* 8, 243-49 (1933); STOUGHTON & BUTTS, *op. cit. supra* note 7, at 65, 298-99; NEWTON, *op. cit. supra* note 7, at 557-58, 563, 564.

<sup>9</sup> LIDDELL & DOAN, *op. cit. supra* note 8, at 244, 261; NEWTON, *op. cit. supra* note 7, at 561, 563, 568, 573; TAGGART, *HANDBOOK OF ORE DRESSING* 955-56 (1927 ed.); STOUGHTON & BUTTS, *op. cit. supra* note 7, at 102-03, 300, 301, 348.

<sup>10</sup> 15 *ENCYCLOPEDIA BRITANNICA*, *Mercury*, 270 (1956 ed.); STOUGHTON & BUTTS, *op. cit. supra* note 7, at 352; NEWTON, *op. cit. supra* note 7, at 535.

facturing process.”<sup>11</sup> Thus, he would classify not only the included processes listed above which involve chemical changes but every included process listed in clause (iv) of Section 114(b)(4)(B) as a manufacturing process.

Indeed most, if not all, of the processes listed in that clause do effect a change in the physical or chemical identity of the material or both. Crushing and grinding, which are usually required as preparatory steps to concentration by physical means,<sup>12</sup> certainly change the physical identity of the ore.<sup>13</sup> The definitions of various processes set out in Appendix B to the Government's brief and the authorities there cited for these definitions show the following about other processes listed in clause (iv) of the statute as included in “ordinary treatment processes.” Leaching not only effects a chemical change in the mineral but also changes its physical form from solid to liquid.

<sup>11</sup> TAGGART, *op. cit. supra* note 1, at 1-01.

<sup>12</sup> NEWTON, *op. cit. supra* note 7, at 333-34; RICHARDS & LOCKE, *op. cit. supra* note 5, at 5, 67, 87.

<sup>13</sup> So does the pulverization of talc, which was added by Congress to the list of processes specifically included in “ordinary treatment processes” in enacting the Internal Revenue Code of 1954 (Section 613(c)(4)(E)) after hearing testimony from industry representatives that the Treasury Department was refusing to consider fine pulverization of talc as an ordinary treatment process although there is no market for talc until it is pulverized and although the Tax Court had rejected the Government's contention. House Hearings, 1953, pp. 2033-43 (quoted in part in Gov't App. B, pp. 310-11, 448-51). The Tax Court case referred to is *International Talc Co.*, 15 T.C. 981 (1950). The issue was decided against the Government's position again in *Townsend v. The Hitchcock Corp.*, 232 F.2d 444 (4th Cir. 1956).

The same is true of cyanidation. Precipitation, which follows leaching and cyanidation, changes the liquid compound chemically and physically to impure metal in solid form. Crystallization is a process of changing a liquid into a crystalline form. The furnacing of quicksilver is a distillation process involving both chemical changes and physical changes. Cinnabar ore, a solid, is heated to volatilize the mercury and the mercury vapor is then condensed into a liquid.<sup>14</sup> Mercury is sold in the liquid form, in flasks; there is no market for the crude cinnabar ore.<sup>15</sup>

Further evidence that in enacting Section 114(b) (4)(B) Congress was not trying to draw a line between "mining" and "manufacturing" based on the technical nature of the process but instead was establishing a practical commercially marketable products rule, is found in a comparison of certain processes expressly excluded from "ordinary treatment processes" by the statute with other processes which are expressly included in the term.

Thus, smelting is excluded, whereas leaching and cyanidation, which like smelting are metallurgical

<sup>14</sup> See definitions of leaching, cyanidation, precipitation, crystallization, and furnacing of quicksilver in Gov't App. B, pp. 498-99, and authorities there cited. See also notes 7, 8, 9, 10 *supra*.

<sup>15</sup> *New Idria Quicksilver Mining Co. v. Commissioner*, 144 F.2d 918 (9th Cir. 1944); U.S. BUREAU OF MINES, DEPT OF INTERIOR, BULL. 556, MINERAL FACTS AND PROBLEMS 514 (1956); House Hearings, 1942, pp. 1199, 1202 (Gov't App. B, pp. 152, 153); Silver Subcommittee Hearings, 1942, p. 762 (Gov't App. B, pp. 161-62).

processes for separating metal from the ore involving chemical changes,<sup>16</sup> are included. The explanation is that metallic ores which can be smelted economically can be sold in the concentrate form, before smelting or refining.<sup>17</sup> On the other hand, leaching is used, for example, in the case of copper ores which are of too low a grade to smelt,<sup>18</sup> and cyanidation is used in the case of gold ores more amenable economically to that process than to smelting;<sup>19</sup> therefore leaching or cyanidation may be necessary in order to obtain a commercially marketable product.

Similarly, the process of roasting, which is specifically excluded, is very similar to furnacing quicksilver ores,<sup>20</sup> which is specifically included; in fact, the furnacing of quicksilver ores is frequently termed "roasting."<sup>21</sup> The only rational explanation is that the furnacing process must be applied to quicksilver ore in

<sup>16</sup> TAGGART, *op. cit. supra* note 1, at 1-91; STOUGHTON & BUTTS, *op. cit. supra* note 7, at 87, 281, 298.

<sup>17</sup> Joint Committee Report, 1930 (App. XXXI, Shepherd Report) pp. 69-71 (Gov't App. B, pp. 82-87); TAGGART, *op. cit. supra* note 1, at 2-254; see Gov't Br. 8.

<sup>18</sup> TAGGART, *op. cit. supra* note 9, at 950; see STOUGHTON & BUTTS, *op. cit. supra* note 7, at 298; U. S. BUREAU OF MINES, DEPT OF INTERIOR, MATERIALS SURVEY: COPPER, c. II, at 57 (1952).

<sup>19</sup> TAGGART, *op. cit. supra* note 1, at 2-72, 2-74, 2-75.

<sup>20</sup> STOUGHTON & BUTTS, *op. cit. supra* note 7, at 79-80, 352.

<sup>21</sup> TAGGART, *op. cit. supra* note 1, at 2-206; 15 ENCYCLOPEDIA BRITANNICA, *Mercury* 270 (1956 ed.); U. S. BUREAU OF MINES, DEPT OF INTERIOR, I. C. 7941, *MERCURY* 34 (1959); Silver Subcommittee Hearings, 1942, pp. 761, 762 (Gov't App. B, pp. 159, 161-62).

order to obtain a marketable product,<sup>22</sup> whereas ores which are roasted, principally lead, zinc and some copper ores,<sup>23</sup> are marketable in the concentrate stage,<sup>24</sup> prior to treatment by roasting.<sup>25</sup>

## 2.

**Analysis of Included and Excluded Processes Showing Congress' Recognition of Different Commercially Marketable Products of the Same Mineral**

Congress' recognition that "the commercially marketable mineral product or products" within the meaning of the statute may be different for miners of the same mineral is shown by the nature of certain processes which it has expressly listed in the statute as included in "ordinary treatment processes" for designated minerals and ores and certain other processes which it has excluded from the term for designated ores.

For instance, in the case of coal, Clause (i) of Section 114(b)(4)(B) includes as ordinary treatment processes "cleaning, breaking, sizing, and loading for shipment." The Government's brief, citing authorities, states (p. 29) that cleaning, breaking and sizing are necessary, *at least in the case of anthracite*, to put the coal in marketable form. In *Black Mountain Corporation*, 21 T.C. 746, 754 (1954), the Tax Court found as facts that mine operators clean all coal, size most coal, and break the "greater share of anthracite coal."

<sup>22</sup> See note 15 *supra*.

<sup>23</sup> NEWTON, *op. cit. supra* note 7, at 476-78.

<sup>24</sup> TAGGART, *op. cit. supra* note 1, at 2-254, 2-255; Strauss, *Marketing of Nonferrous Metals and Ores*, in *ECONOMICS OF THE MINERAL INDUSTRIES* 282-83 (1959).

<sup>25</sup> See note 23 *supra*.

Until recent years, most of the bituminous coal purchased by railroads and many industrial users was unbroken coal in the size as mined ("mine run"), and such users still purchase mine-run coal regularly in addition to broken sizes.<sup>26</sup> By including all the processes listed for coal as "ordinary treatment processes," although not always necessary to make coal marketable, Congress recognized that there may be different commercially marketable products of the same class of mineral listed in the statute. Furthermore, in adopting the Internal Revenue Code of 1954, Congress added to the processes listed in the statute as "ordinary treatment processes" in the case of coal "dust allaying" and "treating to prevent freezing,"<sup>27</sup> after hearing testimony by a representative of the coal industry that only about 9 per cent of the total national bituminous coal production is treated to allay dust, but that practically all bituminous coal for residential heating purposes must be so treated in order to be sold, and that anti-freeze treatment is necessary in shipping coal only in the northern parts of the country during winter months.<sup>28</sup>

<sup>26</sup> Lambur, *Coal Marketing and Trade*, in *ECONOMICS OF THE MINERALS INDUSTRIES* 338, 339-40, 341 (1959).

<sup>27</sup> INT. REV. CODE OF 1954, § 613(c)(4)(A) (p. 114 *infra*).

<sup>28</sup> Senate Hearings, 1954, pp. 1409-18 (quoted in part in Gov't App. B, pp. 342-48). The coal industry representative, in asking the Senate Finance Committee to make these amendments, explained that the Tax Court had held in *Black Mountain Corporation*, 21 T.C. 746 (1954), that oil treatment to allay dust was not an ordinary treatment process. The Tax Court found that untreated coal was the first commercially marketable product of the taxpayer, a coal mining company which sold the larger portion of its output for industrial purposes without such treatment.

Furthermore, the statute expressly includes as "ordinary treatment processes," in the case of gold, copper, and other ores not customarily sold in the form of a crude mineral product, amalgamation, cyanidation, and leaching, but provides that smelting of such ores is not included as an ordinary treatment process. Amalgamation or cyanidation, or a combination of these processes, yields gold bullion from gold ores amenable to such processes.<sup>29</sup> On the other hand, some gold ores are smelted; and in such cases, ore concentrate is the product which goes to the smelter.<sup>30</sup> Gold bullion is a different, more processed product than gold ore concentrate.<sup>31</sup> Yet the statute clearly contemplates that in some cases the commercially marketable product of gold ore is gold bullion since amalgamation and cyanidation are "ordinary treatment processes," and that in other cases the commercially marketable product of gold ore is the ore concentrate, since smelting is not an "ordinary treatment process."

Similarly, copper ores, depending upon their grade and type, are either smelted or leached.<sup>32</sup> Leaching is used in the case of copper ores which, because of their grade or type, cannot be smelted economically,<sup>33</sup> and it

<sup>29</sup> TAGGART, *op. cit. supra* note 1, at 2-74 (reprinted pp. 166-70 *infra*); GAUDIN, *op. cit. supra* note 6, at 477; RICHARDS & LOCKE, *op. cit. supra* note 5, at 280.

<sup>30</sup> TAGGART, *op. cit. supra* note 1, at 2-72; RICHARDS & LOCKE, *op. cit. supra* note 5, at 209; STRAUSS, *Marketing of Nonferrous Metals and Ores*, *op. cit. supra* note 24, at 294.

<sup>31</sup> TAGGART, *op. cit. supra* note 1, at 2-74 (p. 167 *infra*); Silver Subcommittee Hearings, 1942, p. 736 (Gov't App. B. pp. 154-55).

<sup>32</sup> STOUGHTON & BUTTS, *op. cit. supra* note 7, at 280-81, 298.

<sup>33</sup> See note 18 *supra*.

yields impure copper.<sup>34</sup> The statute clearly contemplates that, if copper ore is smelted, the ore concentrate is the commercially marketable product since "smelting" is excluded from "ordinary treatment processes." On the other hand, if the ore must be leached in order to obtain a commercially salable product, the leaching is an ordinary treatment process and the commercially marketable product is the impure copper.

### Part B: Cases

#### UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5186

DRAGON CEMENT COMPANY, INC., *Plaintiff, Appellant,*

v.

UNITED STATES OF AMERICA, *Defendant, Appellee.*

Appeal from the United States District Court for the  
District of Maine

Before MAGRUDER, *Chief Judge*, and WOODBURY and  
HARTIGAN, *Circuit Judges*

Opinion of the Court

[244 F. 2d 513]

May 14, 1957

MAGRUDER, *Chief Judge*. Appellant, a Maine corporation, in its capacity as successor (by merger effective November 30, 1951) to Lawrence Portland Ce-

<sup>34</sup> STOUGHTON & BUTTS *op. cit. supra* note 7, at 299-301.

ment Company, a Pennsylvania corporation, brought this action in the United States District Court for the District of Maine seeking recovery of federal income and excess profits taxes for the period January 1 to November 30, 1951, in the amount of \$483,522.19, with interest. The facts were not in dispute and were recited in a stipulation. Both parties having moved for summary judgment, the district court on September 24, 1956, entered a judgment the first paragraph of which (as subsequently amended) decreed that the plaintiff recover of the defendant the sum of \$10,546.46, with interest, on account of a deductible tax loss under § 23(f) of the Internal Revenue Code of 1939, an issue which is no longer in the case, and the second paragraph of which decreed as follows:

"2. That plaintiff take nothing further in consequence of plaintiff's complaint as to the issue of percentage depletion and as to that issue, the action be and it is hereby dismissed on the merits."

The taxpayer has appealed from that portion of the judgment denying recovery to it under the percentage depletion issue, so that the case now before us turns solely on a question of statutory interpretation of § 114(b)(4)(B) of the 1939 Code, as amended, which defines the term "gross income from mining" for use in determining the basis for percentage depletion allowed as a deduction from income derived from certain mines and natural mineral deposits.

The allowance for depletion has been a controversial subject for years, and officials of the executive branch

have sought from time to time, with conspicuous lack of success, to persuade the Congress to eliminate some of its alleged overgenerous features. See Mertens, *Law of Federal Income Taxation* § 24.04 (1954). We are not concerned with the wisdom or policy of the statutory allowance, once we are sure what the allowance is, for it is plainly our judicial function merely to apply the allowance as Congress wrote it and meant it.

The need for and fairness of some allowance for depletion proceeds from the fact that the production of income through the exploitation of natural resources is accompanied by an inevitable consumption of capital in the form of the gradual exhaustion of the natural resource being exploited. Thus the allowance serves to offset the injustice of classifying only as income what might be regarded as income commingled with return of capital, and serves also as an incentive to encourage capital expenditures in the direction of discovery and exploitation of natural resources.

Of the three types of depletion allowance prescribed at various times by the Congress, percentage depletion (with which we are now concerned) is to be contrasted with cost depletion and discovery depletion. Cost depletion, based upon the cost to the taxpayer of the particular deposit, seeks to return to the taxpayer free of tax that portion of his cost attributable to the amount of the deposit used up in earning the income on which he is taxed during a given taxable year. Discovery depletion seeks to reward the taxpayer for the discovery of unknown natural deposits, and has

usually been based upon the fair market value of the deposit within thirty days after the date of its discovery. By the third type of depletion allowance, percentage depletion, the Congress hoped to furnish an easily computable allowance that would avoid many of the complications arising in connection with the computation of cost or discovery depletion. Percentage depletion is based upon a fixed percentage of the income realized during the taxable year from the exploitation of a piece of property—the percentage varying, somewhat arbitrarily, depending upon the kind of deposit involved.

With the gradual enlargement of the categories of mineral properties to which the percentage depletion became applicable, the Congress has at the same time automatically eliminated discovery depletion in respect to such deposits.<sup>1</sup> In general, percentage depletion has remained as an alternative to cost depletion, so that even if the taxpayer fails to establish the cost of the property, he nevertheless may be entitled to the allowance of a percentage depletion. It is also true, as pointed out in Mertens, *Law of Federal Income Taxation* § 24.31a (1954), "that through percentage depletion a taxpayer may recover more than his cost over the life of the property."

For present purposes we need go no further back than to the provisions of the Internal Revenue Code of 1939.

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<sup>1</sup> The 1954 Code has now abolished discovery depletion entirely as applied to future years.

Section 23 of this Code contained the following (53 Stat. 12, 14):

“Sec. 23. Deductions from Gross Income.

In computing net income there shall be allowed as deductions: . . .

(m) Depletion.—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. . . .

(n) Basis for Depreciation and Depletion.—The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be as provided in section 114.”

Section 114(b)(1) stated as the general rule (53 Stat. 45) that the basis for the depletion allowance should be the adjusted basis in § 113(b) for determining gain upon the sale or other disposition of such property, except as otherwise provided in the ensuing paragraphs numbered (2), (3), and (4). Paragraph (2) related to discovery value in the case of certain mines. Paragraph (3) gave a percentage depletion formula for oil and gas wells. Paragraph (4) gave percentage depletion formulas for coal, metal, and sulphur mines (but not including the type of deposit

involved in the case at bar), and provided allowances based upon a prescribed percentage of the "gross income from the property during the taxable year".

The phrase "gross income from the property" was undefined as it appeared in the 1939 Code. It thus had a lurking ambiguity where the mine owner customarily performed more than merely extractive operations before realizing any income; in such cases, would the basis for the depletion allowance include gross income from what in other contexts might be described as manufacturing operations upon the extracted property? The statute did not make this point clear, and Regulations 111, as originally issued, naturally sought to narrow the scope of the allowance.

In the Revenue Act of 1943 (58 Stat. 45), the Congress attempted to resolve this ambiguity by inserting a definition of "gross income from the property" in a new § 114(b)(4)(B), reading in part as follows:

"(B) Definition of Gross Income From Property.—As used in this paragraph the term 'gross income from the property' means the gross income from mining. The term 'mining', as used herein, shall be considered to include not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products. The term 'ordinary treatment processes', as used herein, shall include the following: (i) In the case of coal—cleaning, breaking, sizing, and loading for shipment; (ii) in the case of

sulphur—pumping to vats, cooling, breaking, and loading for shipment; (iii) in the case of iron ore, bauxite, ball and sagger clay, rock asphalt, and minerals which are customarily sold in the form of a crude mineral product—sorting, concentrating, and sintering to bring to shipping grade and form, and loading for shipment; and (iv) in the case of lead, zinc, copper, gold, silver, or fluor-spar ores, potash, and ores which are not customarily sold in the form of the crude mineral product—crushing, grinding, and beneficiation by concentration (gravity, flotation, amalgamation, electrostatic, or magnetic), cyanidation, leaching, crystallization, precipitation (but not including as an ordinary treatment process electrolytic deposition, roasting, thermal or electric smelting, or refining), or by substantially equivalent processes or combination of processes used in the separation or extraction of the product or products from the ore, including the furnacing of quicksilver ores.”

It is apparent that the Congress intended not to limit the computation of the percentage depletion allowance to the gross income attributable to purely extractive processes, for the deposit when thus first extracted might not be in a commercially marketable form, and might require further processing. Congress accomplished this by providing for, the first time a general formula, and by giving nonexclusive illustrations of processes included in the phrase “ordinary treatment processes”. See § 3797(b) of the Code of 1939, 53 Stat. 470. The general formula, which of

course is controlling, is that the basis for computing the percentage depletion allowance shall be the "gross income from mining", defined as including "not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products." Thus we must look to see what processing is normally undertaken by a mine owner or operator in order to obtain a commercially marketable product, and when such a salable product is obtained, then the gross income from the sale of such product is the base upon which to apply the percentage depletion allowance. That these "ordinary treatment processes" are not necessarily limited to those processes which leave the extracted deposit in its natural state is clear from the inclusion, as in illustration in § 114(b)(4)(B), of the process of furnacing quicksilver ores, which involves a chemical change.

It would also be helpful, in a preliminary way, to observe that the depletion allowance is not an allowance upon any *process*, whether a mining process or a manufacturing process. Nor is it an allowance, as such, upon any product. Instead, it is an allowance to the mine owner designed as a simple means to diminish his taxable income from the exploitation of a natural resource which is necessarily exhausted in the process. In making this allowance, the Congress has elected not to limit the deduction in all cases to the taxpayer's actual cost or other basis in the land from which the ore or mineral is extracted. To supply a simpler rule, the Congress has turned more and more

to the method of percentage depletion, which differs from both cost and discovery value depletion in that it is measured by an arbitrary percentage of gross income from the property, without regard to the taxpayer's cost or discovery value.

From the foregoing it is clear that by the enactment of 1943 the Congress for the first time introduced into the statute key language which had not theretofore appeared either in the statute or in the regulations thereunder, namely, a new definition of "gross income from mining" as including "not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products." Notwithstanding this, the Commissioner has subsequently sought, by regulatory amendments to § 29.23 (m)-1(f) of Treas. Reg. 111, in cases where the mine owner customarily had to indulge in further processing other than merely extractive operations before obtaining a commercially marketable product upon which he could realize any income, to prescribe a relatively complex mathematical method for calculating the percentage depletion base. This would require an allocation of income derived from the sale of the first marketable product to the various treatment processes in proportion to their cost, with only those processes allowed as part of the base which occurred before any chemical change had taken place in the extracted mineral.

By § 319 of the Revenue Act of 1951 (65 Stat. 497), the Congress amended § 114(b)(4)(A) of the Internal

Revenue Code so as to extend the availability of percentage depletion for the first time to "calcium carbonates," which includes deposits of cement rock, the natural resource involved in the case at bar. The prescribed percentage for calcium carbonates was ten per cent of the gross income from mining the deposit.

With the foregoing stated by way of background, it will perhaps be easier to understand the significance of the facts in the present case.

Throughout the tax period in question, Lawrence Portland Cement Company, the taxpayer-appellant's predecessor, owned and operated two quarries, one in Maine and the other in Pennsylvania, from which it extracted cement rock, a calcium carbonate suitable for conversion into cement. The operations began with drilling and primary blasting from the face of the quarry by the open pit method to obtain the cement rock, which was then broken into manageable size by secondary blasting and loaded by shovels into dump trucks which carried it to an inclined railway where it was deposited into dump rail cars for transportation to the near-by plant.

Treatment or "beneficiation" then occurred at the plant in the following processes: The dump rail cars deposited the cement rock into a large primary crusher, which reduced the size of the extracted rock to pieces with a maximum dimension of about eight inches. After this primary crushing, the cement rock fell onto a conveyor belt which carried it to a secondary crusher which further reduced the size of the rock. From the secondary crusher a conveyor belt carried the cement rock to a shed, from which it was picked up by an over-

head crane which deposited the desired quantities into a hopper, over which a coarse bar grate was fitted to screen the crushed cement rock. From the hopper, the screened cement rock was gravity-fed to a ball mill where it was ground with water to a proper fineness known as "slurry," which was then conveyed to a wet "slurry" tank where it was kept in suspension by a revolving paddle mechanism. The "slurry" was then run off to filters where much of the water was removed, and the resulting filter cake was thereafter conveyed by belt to rotary kilns.

There is no dispute that the gross income allocable to the operations thus far described may be included in determining the gross income from mining of the mineral, cement rock, for the purpose of calculating the base to which the allowable percentage depletion is to be applied. But it was found as a fact by the trial court, and we understand that this is not controverted by the government, that except in negligible amounts, which may be disregarded, "there is no commercial market for cement rock. The first commercially marketable product is cement. The methods used by taxpayer to transform cement rock into cement are admitted to be the 'ordinary treatment processes normally applied by mine owners or operators' who produce cement."

Accordingly, the taxpayer's predecessor had to engage in further processes before obtaining a marketable product, cement, upon which gross income could be realized. The so-called filter cake was run into the upper end of rotary kilns, which were in the form of long rotating cylinders set at slight inclination, the

filter cake gradually traveling toward the lower end of the kiln. Hot gases from a flame at the lower end evaporated the water from the filter cake and burned the remaining material to a dense clinker. The clinker was then conveyed to a grinding mill where it was ground to the fineness of cement; the cement was finally placed in silos from which it was loaded and shipped in bags or in bulk. It is conceded that these last processes effected a chemical change in the cement rock, transforming it from its crude mineral state into cement, which is synthetic and not a mineral.

The dispute here involves the propriety of including income allocable to the kiln and post-kiln processes in gross income from mining, as defined; if such processes are excluded, the depletion allowance for the taxable period would be \$204,859.19, whereas, if such processes are included, the allowable depletion would be \$795,852.60.

It is contended by the government that mining terminated, and that the depletion base was arrived at, when the mine operator had prepared the cement rock for conversion, and that the subsequent operations, during which it underwent a chemical change and ceased to be a mineral, constituted a manufacturing process, not allowable in computing the depletion base. As indicated above, this contention is fully supported by Treas. Reg. 111, § 29.23(m)-1(f), but the taxpayer maintains that the regulation is invalid in this respect because the definition of "gross income from mining", inserted in § 114(b)(4)(B) in 1943, does not permit such an interpretation, but on the contrary compels the opposite result. Although the district court up-

held the government's view, we find ourselves in agreement with the taxpayer.

Preliminary to upholding the government's asserted interpretation, the district court concluded that the statutory language, "commercially marketable mineral product or products", was intrinsically ambiguous. One possibility, the district court said, was to construe the phrase as permitting the depletion allowance to extend to a product of a mineral, although the end product may be a synthetic non-mineral (*viz.*, a commercially marketable mineral *product*). The second possibility, said the district court, was to construe the statutory phrase as restricting the depletion allowance to products still in a mineral state (*viz.*, a commercially marketable *mineral product*).

We are unable to perceive that the statutory language contains any such inherent ambiguity. In this connection it should be observed that three other courts of appeals which have had occasion to weigh the government's arguments advanced in the case at bar, and to construe the critical statutory phrase, have held it to be "clear and unambiguous" in favor of the taxpayer's interpretation. See *United States v. Cherokee Brick & Tile Co.*, 218 F.2d 424, 425 (C.A. 5th, 1955); *Townsend v. The Hitchcock Corp.*, 232 F.2d 444, 446 (C.A. 4th, 1956); *United States v. Sapulpa Brick & Tile Corp.*, 239 F.2d 694, 697 (C.A. 10th, 1956). We are not persuaded that we ought to create a conflict with our brethren in other courts of appeals with respect to this matter.

In the first place it should be noted that cement has been consistently classified as a "mineral product"

both in scholarly compilations of a general sort, such as the *Encyclopedia Britannica*,<sup>2</sup> and in publications of specialized government agencies which compile information and statistics on the mining industry. Such classification has been made by the Bureau of Mines and the Bureau of the Census, both of which had listed cement as a "mineral product" at the time the statutory definition of "gross income from property" was enacted in the Revenue Act of 1943,<sup>3</sup> and this classification has been continued in the latest publications of these agencies.<sup>4</sup>

Furthermore, it is well known that the word "mineral" is frequently used before other words to describe products which are manufactured from minerals but which are not themselves composed of minerals in the natural state. In such usage it qualifies the noun which follows and indicates mineral origin; for example, "mineral wool" is a generic term which can be applied to various insulation products manufactured from minerals.<sup>5</sup> The dictionary furnishes many similar examples.<sup>6</sup>

<sup>2</sup> 22 *Encyc. Britannica* 753, Table XIII (1954).

<sup>3</sup> *Minerals Yearbook for 1942*, pp. 38, 45, 48 (1943); *Statistical Abstract of the United States, 1942*, p. 845. In addition, the *Statistical Abstract* statistics as to production of cement (pp. 879, 888) appear in a section entitled "Mining and Mineral Products."

<sup>4</sup> *Minerals Yearbook for 1953*, vol. 1, p. 20 (1956); *Statistical Abstract of the United States, 1956*, pp. 732, 743.

<sup>5</sup> 9 Kirk & Othmer, *Encyc. of Chemical Technology* 122 (1952).

<sup>6</sup> *E.g.*, *mineral oil*, "Any oil of mineral origin, as petroleum, shale oil, or any oil obtained from them by refining"; *mineral water*, "Any water naturally or artificially impregnated with mineral salts or gases"; *mineral jelly*, a "semisolid substance from petro-

The legislative history of § 114(b)(4)(B) provides additional support for the interpretation of the statutory definition which we, along with other courts of appeals, have adopted. In order to support its conclusion that cement is not a "mineral product" within the meaning of the statutory definition, the district court seized upon the word "mineral" as the crucial word in the phrase "the commercially marketable mineral product or products." However, that "mineral" is not the crucial word is made clear by the Senate Finance Committee Report which explained the meaning of the section added by that committee to the Revenue Act of 1943:

"The purpose of the provision is to make certain that the ordinary treatment processes which a mine operator would normally apply to obtain a *marketable product* should be considered as a part of the mining operation, and to give reasonable specification of what are to be considered such processes for various kinds or classes of mines." (Italics added.) Sen. Rep. No. 627, 78th Cong., 1st Sess., 23, 1944 Cum. Bull. 991.

In other words, although the draft of the bill to which the above report referred contained the word "mineral" and the phrase was in the same form as in the final Act, the committee did not even use the word

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*leum* . . . used as a stabilizer in explosives"; *mineral spirits*, a "volatile petroleum product, intermediate between gasoline and kerosene, used extensively as a thinner for paints and varnishes"; *mineral rubber*, which includes "an asphalt artificially obtained or treated." (Italics added.) Webster's New International Dictionary, Unabridged (2d ed. 1953).

"mineral" in explaining that the purpose of the statutory provision was to make certain that the ordinary treatment processes which a mine operator would normally apply to obtain a marketable product should be considered as a part of the mining operation, as defined.

Nor can we accept the government's contention that the Congress in 1943 was concerned solely with making clear that concentration processes, equivalent to those which had previously been listed in the applicable regulations, were intended to be included as a part of the mining operation, for in defining "gross income from mining," the Congress introduced new language which had never previously appeared in the history of the depletion allowance. Furthermore, the Senate Finance Committee Report which explained the provision gave no hint that Congress intended only to include such "equivalent concentration processes". Quite the contrary, as the previous quotation shows, the committee report stated that the purpose of the new provision was "to make certain that the ordinary treatment processes which a mine operator would normally apply to obtain a marketable product should be considered as a part of the mining operation".<sup>7</sup>

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<sup>7</sup> It should also be observed that the government's position is subject to the anomaly that under its interpretation there never is a "commercially marketable mineral product" obtained from cement rock. Thus, to be perfectly consistent, "mining" under § 114 (b) (4) (B) would not include any "ordinary treatment processes" applied to cement rock, since mining includes only "ordinary treatment processes" applied to obtain the "commercially marketable product or products."<sup>4</sup>

For the reasons above indicated, we conclude that the taxpayer is entitled to a percentage depletion deduction based upon its gross income from cement, as the first commercially marketable mineral product obtained from the deposit, calcium carbonate, after the ordinary treatment processes normally applied by such mine owners. To the extent that § 29.23(m)-1(f) of Treas. Reg. 111 is inconsistent with this conclusion, it must be declared to be invalid. See *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134 (1936).

A judgment will be entered vacating that portion of the judgment of the District Court now under review, and remanding the case to the District Court for further proceedings not inconsistent with this opinion.

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

No. 16,093

COMMISSIONER OF INTERNAL REVENUE, *Petitioner.*

v.

IOWA LIMESTONE COMPANY, *Respondent.*

Petition to Review Decision of the Tax Court of  
the United States

[269 F.2d 398]

(July 10, 1959.)

BEFORE SANBORN, VOGEL, and VAN OOSTERHOUT, *Circuit  
Judges*

VAN OOSTERHOUT, *Circuit Judge.*

The Commissioner of Internal Revenue has filed timely petition for review of the decision of the Tax Court (opinion reported 28 T. C. 881) rejecting his contention that the taxpayer owes additional income tax for the years 1950<sup>1</sup> and 1951 by reason of claiming more percentage depletion than it was entitled to under section 114(b)(4) of the Internal Revenue Code of 1939.<sup>2</sup>

The principal question presented is the amount of

<sup>1</sup> The 1950 tax is involved only by virtue of an unused excess profits tax credit carryback from 1951.

<sup>2</sup> All statutory references in this opinion are to the Internal Revenue Code of 1939, as amended.

percentage depletion allowable to the taxpayer upon the pulverized chemical grade limestone it mines and processes. More particularly, the problem is the product base upon which the percentage depletion is to be computed. The Commissioner contends the depletion must be computed upon a base measured by the gross income from crushed limestone. Taxpayer contends that it is entitled to compute its depletion upon the basis of its gross income from pulverized chemical grade limestone, which it contends is its first commercially marketable product.

The Tax Court, after hearing the evidence, made findings of fact as follows:

“The first commercially marketable product produced by petitioner from its limestone was finely ground or pulverized calcium carbonate, at least 95 per cent pure, free from toxic impurities, and containing not more than one per cent moisture.

“The processes of original quarrying, crushing, heat treatment to remove moisture, and pulverization, which petitioner applied to arrive at its product, were ordinary treatment processes normally applied by mine owners to obtain the commercially marketable product.”

Based upon such finding, the Court determined that the taxpayer was entitled to compute its percentage depletion upon the basis of gross income derived from its finished product, except for the cost of chemicals added and the cost of bagging, which costs taxpayer had deducted from gross income in establishing its base for percentage depletion.

There is no real dispute as to the pertinent facts. Taxpayer is an Iowa corporation engaged in the business of quarrying and processing chemical grade limestone. The quarry is located at Alden, Iowa. The processing plant is adjacent to the quarry. Taxpayer's limestone has a calcium carbonate content of over 95 per cent with a low percentage of impurities. It qualifies as chemical grade limestone.<sup>3</sup> The Tax Court in its opinion states:

"Dr. H. Garland Hershey, Director and State Geologist of the Iowa Geological Survey, in a report dated December 11, 1953, stated that petitioners' limestone had the highest percentage of calcium carbonate and the lowest impurity content of any limestone tested, except one near Gilmore City, Iowa, and is available near the surface over a very small area as compared to the total exposed area of all other limestone in Iowa."

In the midwest there are more than a thousand quarries producing agricultural limestone and about six hundred producing stone used for building and road purposes, but there are less than a dozen quarries producing chemical grade limestone.

The Tax Court fairly summarized taxpayer's method of producing its product, as follows:

"The processes employed by petitioner consist of stripping the overburden, and blasting the face of the quarry with explosives in drill holes. The

<sup>3</sup> At the trial an issue was raised as to whether taxpayer's stone was chemical grade limestone. The Commissioner in his brief specifically states that he does not contest the Tax Court's finding that taxpayer's limestone is chemical grade limestone.

broken limestone is loaded in trucks and hauled to the primary crusher which reduces it to varying sizes from a tennis ball to a football or basketball. The large pieces are carried into the plant where a secondary crushing in hammer mills takes place. The limestone is then conveyed into roller mills which process the material, and the moisture is removed by hot air from furnaces being forced through the roller mills. The limestone is drawn by air stream from the top of the roller mills by a series of collectors. Part of the finely processed limestone is treated with chemicals, such as iodine, upon specifications of particular customers. Both the chemically treated and untreated pulverized limestone is packaged in 50 and 100 pound paper bags. A part of the processed product is shipped in bulk by loading in tank cars on petitioner's spur track. The introduction of air, heated to about 400 degrees, merely removes the moisture and does not cause any chemical change."

The taxpayer's plant was constructed to produce pulverized chemical grade limestone. The stone at the time it enters taxpayer's plant after primary crushing is not commercially marketable for any purpose. There is no place in the plant where the material can be withdrawn after it has started its journey through the plant. Samples taken after the hammer mill operation in the plant indicate that the stone is not sufficiently crushed at that stage to be commercially marketable for any purpose. The available market for taxpayer's product is feed and mineral manufacturers. All purchasers in-

sist that the stone be finely ground, contain at least 95 per cent of calcium carbonate, be free from toxic impurities, and contain less than 1 per cent moisture. There is no demand for chemical grade limestone for chemical purposes except in the fully processed finely ground form produced by the taxpayer.

All of the taxpayer's product, except an insignificant amount of dirty, contaminated stone, sold to a county for road purposes, was sold in its fully processed form. There is a market for limestone for road rock and agricultural purposes in a crushed form, but there is no demand for chemical grade limestone in that form. While taxpayer's plant as constructed does not produce limestone satisfactorily crushed for road or agricultural purposes, the plant could be converted to do such crushing.

The right of the taxpayer to a percentage depletion allowance is unchallenged. The depletion allowance is a matter of legislative grace. The deduction is intended as compensation for capital assets consumed in the production of income through the severance of minerals. *Anderson v. Helvering*, 310 U.S. 404. An interesting discussion of the purpose and development of the percentage depletion legislation is found in *Dragon Cement Company v. United States*, 1 Cir., 244 F.2d 513. The scope of the depletion deduction is governed solely by the statutes authorizing the deduction. Our problem is largely one of statutory interpretation. We now look to the controlling statutes.

Section 23(m) authorizes the deduction from gross income from mining of "a reasonable allowance for depletion . . . according to the peculiar conditions in

each case \* \* \*." The statutory provision authorizing percentage depletion for minerals is section 114(b)(4), which reads in part:

*"\* \* \* Percentage depletion for coal and metal mines and for certain other mines and natural mineral deposits.*

*"(A) In general.* The allowance for depletion under section 23(m) in the case of the following mines and other natural deposits shall be—

*"(iii) in the case of \* \* \* chemical grade limestone \* \* \* 15 per centum,*

*of the gross income from the property during the taxable year \* \* \*."*

Section 114(b)(4)(B) defines "gross income from property" as being "gross income from mining," and defines the word "mining" as used therein "to include not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products". As to some ores and minerals the statute describes ordinary treatment processes, but such processes are not enumerated with reference to chemical grade limestone and many other minerals.

In the *Dragon Cement Company* case, *supra*, the court points out that section 114(b)(4)(B) lays down the formula which provides that "the basis for computing

the percentage depletion allowance shall be the 'gross income from mining', defined as including 'not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products.''' With reference to the application of the formula, the court states (p. 516 of 244 F.2d):

\*\*\* Thus we must look to see what processing is normally undertaken by a mine owner or operator in order to obtain a commercially marketable product, and when such a salable product is obtained, then the gross income from the sale of such product is the base upon which to apply the percentage depletion allowance. That these 'ordinary treatment processes' are not necessarily limited to those processes which leave the extracted deposit in its natural state is clear from the inclusion, as an illustration in § 114(b)(4)(B), of the process of furnacing quicksilver ores, which involves a chemical change."

Courts in interpreting section 114(b)(4)(B) have uniformly held that the formula prescribed by the statute is clear and unambiguous, and that the depletion base to be used is the sale price of the first commercially marketable mineral product or products, provided that the processes applied, which are of a manufacturing nature rather than a mining nature, are the processes normally applied by mine owners to obtain the commercially marketable product. Thus, in *Cannelton Sewer-Pipe Co. v. United States*, 7 Cir., 268 F.2d

334, decided June 15, 1959; *United States v. Sapulpa Brick and Tile Corporation*, 10 Cir., 239 F.2d 694, and *United States v. Cherokee Brick & Tile Co.*, 5 Cir., 218 F.2d 424, it was held that brick and tile were the first commercially marketable products from clay and shale mines. *Dragon Cement Co.*, *supra*, holds manufactured cement is the first commercially marketable product from cement rock. *New Idria Quicksilver Mining Co. v. Commissioner of Internal Revenue*, 9 Cir., 144 F.2d 918, holds that mercury is the first commercially marketable product from cinnabar. *Centropolis Crusher Co. v. Bookwalter*, W.D. Mo., 168 F.Supp. 33, a case factually very similar to our present case, holds that finely crushed and ground limestone in eight different graded sizes is a first commercially marketable product from chemical grade limestone. *Riverton Lime and Stone Co. v. Commissioner of Internal Revenue*, 28 T.C. 446, holds that hydrated hydraulic lime, which sold for \$19.20 per ton, is the first commercially marketable product from the limestone mine, although there was demand for agricultural limestone in the vicinity of the mine.

In many of the cases just cited the Commissioner had urged that the manufacturing processes could not constitute part of the "ordinary treatment processes." The Commissioner does not make such argument here, but states that the cases just discussed are not controlling because in most of said cases the Government conceded that the product of the mine before the manufacture stage was not commercially marketable. In our present case, the Government strongly urges that crushed limestone after the hammer mill process and before pulverization is commercially marketable for



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road or agricultural purposes. A similar argument was made to the Seventh Circuit in the *Cannelton Sewer Pipe Co.* case, *supra*, and was rejected. In that case the minerals were clay and shale. While the evidence showed that there was a market for these products, the court found that the price that the taxpayer could get for its clay and shale would be less than its production costs, and hence concluded the clay and shale were not commercially marketable. The court states:

"We agree with the taxpayer that it did not have a *commercially* marketable product in its fire clay and shale. We are unable to accept the theory that a taxpayer's depletion allowance is to be computed on the basis of a representative market or field price for a product which taxpayer could not sell at a profit. To do so would be to deprive of all meaning the words 'commercially marketable' as used in the Code provision here considered. The integrated operations of taxpayer in this case (that is, combined mining and manufacture) were certainly not unique. The evidence the Government used to establish the existence of a market for taxpayer's fire clay indicates, in fact, that the integrated miner-manufacturer was the rule rather than the exception in Indiana, in 1951. The fact that certain operators of strip mines found it economically feasible to extract and sell fire clay primarily in a limited area near Brazil, Indiana does not alter this picture. Finally, there is no contention that taxpayer applied other than ordinary treatment processes in obtaining its finished products."

In *Sparta Ceramic Company v. United States*, N.D. Ohio, 168 F.Supp. 401, 404, the court discusses and defines "commercially marketable" as follows:

"Taxpayer equates 'commercially marketable' with 'economically feasible', and adopts the view that before a product is commercially marketable there must be the prospect of substantial sales with the possibility of a profit being made thereby.

"The Government's theory on the definition of this term is that it means only salable or fit to be offered for sale in business intercourse.

"Both logic and the decided cases support the taxpayer's interpretation.

"Webster's New International Dictionary (2nd Ed.) defines 'commercial' as:

"'1. Of or pertaining to commerce \* \* \*

"'2. Having financial profit as the primary aim'.

"'Marketable' is defined as:

"'1. Fit to be offered for sale in a market; \* \* \*

"'2. Wanted by purchasers, saleable; \* \* \*

"Thus, 'marketable' can be said to be 'saleable, or fit to be offered for sale in a market', which is exactly the definition the Government wishes to ascribe to 'commercially marketable'. The fallacy of this desired interpretation is the failure to include the profit making aspect, 'commercial'."

In *Riverton Lime & Stone Co. v. Commissioner of Internal Revenue, supra*, the Tax Court states (p. 452 of 28 T.C.):

“\* \* \* We think ‘commercially marketable’ means that there is commerce or trade in a mineral product and that there is an established market in which such product is sold. Here there was neither so far as this particular crushed limestone was concerned. But, even in the face of those facts, the respondent argues that because the crushed stone which the petitioner produced *could* have been used for agricultural purposes, it must compute its allowable depletion on the theoretical gross income supposedly derived from the sale of the crushed stone. It seems to us that the effect of that argument is to read the words ‘commercially marketable’ out of the statute.”

We believe that the profit-making aspect must be given consideration in determining whether a mineral product is commercially marketable. As previously stated, taxpayer had a relatively rare and special type of limestone suitable for chemical use. It had the right to market its chemical grade limestone for the purpose for which it was most suited and in a field where it would command a fair price. Gold, silver, and iron ores and other valuable minerals could doubtless be sold for road rock, fill, or ballast, but no one would contend that their value must be determined upon such a limited use of such products. It was not economically feasible for the taxpayer to market its superior stone as ordinary road rock. Many kinds of cheap stone would equally serve such a purpose.

The Government also contends that the only relevant product of any mining industry in which a taxpayer is engaged is the first commercially marketable product of that industry, and that such product in the limestone field is crushed limestone, regardless of the use to which the stone may be put. This argument was properly rejected by the Tax Court. In response to a similar argument, the Seventh Circuit in *Cannelton Sewer Pipe Co., supra*, states:

“\* \* \* The short answer to this is that we do not agree that it was intended that the depletion allowance for each mineral be reduced to the common denominator represented by a conceivable product most cheaply produced from each mineral. In *United States v. Cherokee Brick & Tile Company, supra*, and *United States v. Sapulpa Brick and Tile Corporation, supra*, the Fifth and Tenth Circuits, respectively, allowed depletion on both brick and tile. In *Townsend v. The Hitchcock Corporation, supra*, both talc powder and talc crayons were treated as depletable products.”

We believe that the conclusion reached by the Seventh Circuit is supported by the authorities it cites, and that the court properly interpreted the depletion statute.

We do not think that the depletion statute contemplates that all types of limestone be considered the same mineral. This was apparently the Tax Court's thought when it stated:

“Limestone is divided commercially into three large fields, i. e., chemical and manufacturing

industries, building industries, and agriculture.  
\* \* \*

The foregoing statement is fully supported by the evidence. Chemical grade limestone must meet rigid specifications. A very small proportion of limestone meets such specifications. Specifications for agricultural and building stone are much less exacting. Section 114(b) gives different treatment to various types of limestone. Limestone used for building is classified as stone and is given a 5 per cent depletion rate (§ 114(b)(4)(A)(i)); calcium carbonate carries a 10 per cent rate (§ 114(b)(4)(A)(ii)); and chemical grade limestone carries a 15 per cent rate (§ 114(b)(4)(A)(iii)).

Section 39.23(m)-5(b), Regulations 118,<sup>4</sup> provides in part:

“§ 39.23(m)-5. Computation of depletion based on percentage of income in case of certain mines or other natural deposits.

“ (b) For the purposes of this section, the minerals indicated below shall have the following meanings:

Calcium carbonate \* \* \* Miscellaneous limestones and other calcium carbonate rocks (not specifically

<sup>4</sup> Regulations 118 are effective only to taxable years commencing after December 31, 1951, and were not in effect for the taxable years here involved. The regulations, however, interpret the same section of the Internal Revenue Code of 1939 we are here considering.

provided for at a 5 percent or 15 percent rate of percentage allowance) such as cement rock and limestone used or sold for use in soil treatment. This classification does not include rock or minerals used or sold for use as ballast, road making, concrete aggregates, or other purposes for which chemical composition is not a major requirement.

\* \* \* \* \*

Limestone, chemical grade \* \* \* Limestone used or sold for use in the chemical trades."

The record shows that crushed limestone used for agricultural and road purposes brings \$1.35 to \$1.75 per ton. The Government contends the taxpayer gets \$9.00 per ton for its product. Thus, it would appear that the taxpayer receives some five times as much for its finished product as it would have received if it had sold it in a crushed stage. The breakdown on the increased cost of processing the stone from the crushed stage to the pulverized stage is not readily ascertainable from the record. It is, however, clearly apparent that the increased cost of the additional processing represents only a minor fraction of the higher price received by the taxpayer for its product. The greater part of the higher price received appears to be attributable to the superior quality and relative scarcity of the chemical grade limestone. We find nothing in the percentage depletion statute which compels the conclusion that the depletion base for the taxpayer is limited to the gross income that would have been produced by the sale of the crushed product of an inferior and more

plentiful limestone which is not adaptable to chemical uses.

The Commissioner also argues that to give the taxpayer a greater depletion base than owners of inferior limestone quarries would be inequitable. At least as good an argument can be made that it would be unfair to the taxpayer not to allow it depletion based upon the reasonable consideration of the value of its depletable product. However, such arguments have no weight either way as the depletion base is controlled entirely by the statute. Any inequities call for legislative rather than judicial action.

The Commissioner expresses some fear that the logical result of the Tax Court's holding is that a miner can use as his depletion base the gross sale price of any product he chooses to manufacture. Such fear is without foundation. The depletion statute as interpreted by the Tax Court limits the depletion allowance to the first commercially marketable chemical grade limestone produced. This is manifest by the court's determination that the costs of bagging and chemical additive should be excluded in computing the depletion base. For depletion purposes the product may not be processed beyond the stage where it becomes a commercially marketable product. *Cannelton Sewer Pipe Co. v. United States, supra*; *Sparta Ceramic Company v. United States, supra*.

The evidence fully supports the fact findings of the Tax Court that the first commercially marketable product in the chemical grade limestone field is the finely ground limestone produced by the taxpayer, and that the processes employed by the taxpayer to arrive at

its product were the ordinary treatment processes normally applied by mine owners to obtain such product. Such findings support the court's conclusion that the taxpayer is entitled to use as its depletion base the gross income from the sales of its pulverized chemical grade limestone except for the costs of blending of chemicals and bagging. The percentage depletion is also, of course, subject to the statutory limitation that it shall not exceed 50 per cent of the net income of the taxpayer.

The Commissioner makes an additional contention, covering two pages of his brief, that all costs of bagging and chemical additives were not excluded in determining the depletion base. The claim apparently is that, while costs of bags and chemicals were deducted, a proportionate share of labor costs, depreciation, operating expenses, and overhead should be allocable to these processes by reason of section 29.23(m)-1(f), Regulations 111. This question was raised in the Tax Court in connection with motion for reconsideration and the Rule 50 Computation. The Commissioner in his brief cited no authority in support of his additional contention, other than the regulations, and has failed to point out any fact supporting his contention that the Tax Court erroneously computed the depletion base. The burden is upon the Commissioner as petitioner to demonstrate that error has been committed. This he has failed to do.

Affirmed.

## TAX COURT OF THE UNITED STATES

ALBIN C. HALQUIST AND MADELINE E. HALQUIST,  
PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

[33 T.C. 304]

Docket Nos. 65794, 71133. Filed November 25, 1959.

DRENNEN, *Judge*: Respondent has determined deficiencies in petitioners' income tax in Docket No. 65794 for the years 1951, 1952, and 1953 in the amounts of \$29,545.10, \$32,134.08, and \$17,974.86, respectively; and in Docket No. 71133 for the year 1954 in the amount of \$24,957.92. By amended petition in Docket No. 65794, petitioners claimed overpayments of tax in 1951, 1952, and 1953 of \$1,356.40, \$56.94, and \$4,609.30, respectively.

The issues for decision are: (1) In regard to the building and dimension stone produced and sold by petitioners, whether the gross income from the property for purposes of computing the percentage depletion allowance should be determined by reference to the sales price of the fully processed stone or by reference to the actual or representative market price of the stone in a less processed form; and (2) for years 1951, 1952, and 1953, whether petitioners are entitled under section 114(b)(4), I.R.C. 1939, to the 10 per cent depletion rate provided for dolomite or the 15 per cent rate provided for chemical or metallurgical grade limestone.

## FINDINGS OF FACT.

Some of the facts have been stipulated and are incorporated herein by this reference.

Albin C. Halquist and Madeline E. Halquist, his wife, residing in the Town of Lisbon, Waukesha County, Wisconsin, throughout the years material hereto, were engaged in business as a partnership under the name of Halquist Lannon Stone Co. They filed joint and partnership income tax returns for each of said years on a calendar year accrual method of accounting with the district director of internal revenue at Milwaukee, Wisconsin. In addition, for each of the taxable years 1952 and 1954 they filed amended joint income tax returns, and for 1954, an amended partnership return.

Throughout the taxable years the partnership owned and operated two stone quarries in Waukesha County, Wisconsin. One of them, their principal quarry, was located approximately 2 miles south of the Village of Sussex in the Town of Lisbon, and their smaller quarry, in the Village of Sussex. (Reference will hereafter be made only to the principal quarry, our holdings concerning which will also include the smaller quarry and its production.)

The partnership engaged in the business of removing the stone, processing it, and selling it in the form of two principal products. These products were crushed and broken stone of various grades and sizes, and building or dimension stone in various shapes and sizes. In addition, the partnership produced and sold flagstone and drywall stone. The crushed and broken stone was sold for a variety of purposes, including riprap, ballast,

road surfacing, and agricultural lime. The dimension stone, sometimes referred to herein as building stone, consisted of blocks and slabs of natural stone cut in definite shapes and sizes to be used primarily for building purposes. The principal dimension stone product produced by petitioners was house-veneer stone. In the building stone category, however, they also occasionally produced "specials," sills, finished architectural stone, and other stone fabricated for special purposes according to specifications. Flagstone, generally used for landscaping purposes, is irregularly shaped stone approximately 2 inches thick and having at least one flat side. Drywall stone, usually 8 to 10 inches in width and from 2 to 4 inches in height, is generally used for laying up retaining walls without mortar joints.

The partnership also engaged in the purchase and resale of dimension stone produced by quarries in other parts of the United States.

Stone in petitioners' quarries is known as "Lannon stone" taking its name from the Lannon district which consists of an area approximately 12 miles square, and lies within the portion of the Niagara dolomite formation adjacent to Lake Michigan in Wisconsin. Although the physical and chemical characteristics of all of the stone within the formation are about the same, the formation of the stone in petitioners' quarry is found in two distinct phases. The uppermost strata consists of very thinly bedded slabs of dolomite which are broken by irregular vertical seams or joints so that pieces of stone occur naturally in blocks of a few square feet to perhaps 25 or 50 square feet in areal extent and 2 to 6 inches in thickness as a general rule. Since it

can be taken out in blocks, the stone from this portion of the quarry, extending down about 15 feet in depth, referred to herein as the upper face, is particularly adaptable for the production of dimension stone suitable for building purposes. Also found in this higher strata, at its very upper level, is a thinner layer of stone which is suitable for producing flagstone and drywall.

The lower face is exposed down to about 40 feet in the mine quarry and is characterized by horizontal bedding planes and vertical joints of a markedly different nature. It is more irregularly bedded and much more irregularly broken up by seams, and as a result, is suitable only for processing into crushed and broken stone and agricultural lime.

The horizontal layers of stone in the upper strata from which building stone was produced were extracted and processed in the following manner:

(1) Small holes were drilled vertically into the stone behind the upper face of the quarry, and a small quantity of black powder was inserted in these holes and detonated. The blast did not break up the rock, but the resulting gases followed the natural bed layers and seam faces and loosened the stone from the natural bed deposit. The slabs of stone, ranging from 2 to 3 square feet to extremes of 100 square feet in the horizontal plane (the smaller size pieces were more predominant in petitioners' quarry), were loosened one from the other with crowbars and wedges.

(2) At the upper face blockmen broke the larger pieces of stone into irregularly shaped pieces, using one of two methods—either by a blow from a hammer after first scoring along the line on which it was to be broken.

or by plugging and feathering, which also involved scoring, then the drilling of holes on the scored line and, finally, the driving of wedges into the holes until the stone split.

(3) Using large steel pans the blockmen then sorted the pieces into three categories. Into one pan they placed waste; into the second pan, flagstone and dry-wall requiring no further processing; and into the third pan they placed the pieces of stone suitable for processing into dimension and building stone. At this point, at the upper face of the quarry, there was approximately one pan of waste for each pan of flagstone, dry-wall, and stone to be further processed into dimension stone, resulting then in a waste factor of 40 to 50 per cent. The waste pans were hauled to the edge formed by the bed of the upper face and the top of the lower face, and the waste was dropped to the bed of the lower face to be picked up by mechanical shovels and fed to the crusher. Neither flagstone nor drywall was cut or dressed by cutters, but was broken into desired sizes by blockmen at the face and then merely set aside. The pans containing the stone suitable for processing into dimension stone were carried by trucks operated by blockmen to the cutters, who were arranged around the edge of the quarry mentioned above at a distance of from 50 to 250 feet from the place where the stone was quarried. After large diamond saws were purchased in the latter part of 1954 and were used to perform a smaller part of the cutting operation, stone was also carried by the blockmen to the sawyers.

(4) The cutters then cut and broke the stone into smaller pieces having regular shapes and suitable for

use as dimension or building stone. The principal product produced by the cutters of petitioners' company was house-veneer stone, which was of random lengths and heights depending upon the size and shape of the stone taken out of the quarry. Its width, however, was uniformly a maximum of 4 inches.

(5). Production of the dimension stone by the cutters, which involved cutting, dressing, and drilling of the stone to desired dimensions, was accomplished primarily by the use of hand tools, which included hammers, tifiers, a variety of chisels, bullwedges, shims, and electric handsaws. To separate or break the stone the cutters utilized several methods. One involved the scoring of the stone with an electric handsaw or a type of chisel called the tracer and then the striking of the chisel with a hammer. A more common method was to score the stone and then continue to trace all along the line until the stone split—tracing consists of striking a stone with a hammer and chisel. The third method, known as bullwedging, used to break the thicker pieces of stone, involved scoring, and the chiseling of a small hole into which were placed shims and a wedge; striking of the wedge with a hammer caused the stone to split.

With the large saws, installed by petitioners in 1954, it was possible to saw much larger pieces of stone than had theretofore been handled by individual cutters. Whenever a slab was obtained from the face of the quarry which was large enough to allow economic use of the diamond saw the slab was not broken at the face of the quarry but was brought to the saw and sawed to dimensions suitable for building stone.

Of the stone brought from the quarry to the cutters

for further processing, another 40 to 50 per cent by weight was lost in processing to finished dimension stone; here again this waste was directed to the crushing processes.

The stone deposit below the building stone level of the quarry, which was wholly unfit for use in producing building stone, and the waste from the building stone processes were utilized by petitioners to produce crushed or broken stone and agricultural lime. Stone was secured from the quarry and processed into crushed stone in the following manner:

(1) Charges of dynamite were lodged into deep vertically drilled holes and detonated. Large quantities of stone were, as a result, hurled to the quarry's floor. Most of the stone freed from the quarry face was in pieces small enough to be directed to the crusher; the large pieces were broken by a steel ball. The stone thus blasted and broken from the face of the quarry was then lifted by mechanical shovels and hauled to the crusher which was located at the quarry.

(2) The primary crusher crushed the stone into sizes ranging from dust to over 3 inches in diameter. By conveyor belt the stone was automatically run through a screening process which segregated it into 7 sizes. Stone over 3 inches in diameter was automatically returned to the primary crusher for additional crushing. Some of the stone, 1 to 3 inches in diameter, was run through a hammermill for a secondary crushing operation if smaller sizes were needed, and this stone was also automatically screened and graded.

(3) In the latter part of 1952, petitioners purchased a new crushing plant. From that time on through the remainder of the years involved, the new larger primary crusher was utilized. Also, in addition to the primary crusher and a hammermill, the new plant had a gyratory crusher which was utilized instead of the hammermill for secondary crushing of some of the stone.

The other type of stone handled by petitioners was building stone that was purchased from various parts of the country, almost all of which was different in nature and character from the type of stone found in the Lannon area. Most of this stone was purchased in finished form and was handled by petitioners in order to complete their stone line and to meet consumer requests. Only a small portion was purchased in rough block form and cut by petitioners. Included in the stone purchased was a negligible number of rough blocks of Lannon stone from the very few quarries in the area whose deposits enabled them to take out solid pieces large enough to be processed by saw. This purchased stone facet of petitioners' business is not in issue here.

During the years 1951 through 1954, the selling price of drywall in this area was about \$6 per ton; of flagstone, about \$10 per ton; and of house-veneer stone, about \$26 per ton. Sills and other specially finished architectural stone averaged about \$50 to \$70 per ton. Crushed stone was marketed by petitioners at prices ranging from approximately \$1.03 to \$1.23 per ton.

For each of the taxable years, total sales in tons and dollars (after reduction for delivery and trade-dis-

counts, i.e., "gross income from the property"), direct costs, and net income (after allocating the selling and administrative expenses) attributable to crushed stone and building stone were as follows (cents omitted):

	1951		1952		1953		1954	
	Building stone	Crushed stone	Building stone	Crushed stone	Building stone	Crushed stone	Building stone	Crushed stone
Tonnage.....	18,514	69,097	18,891	83,387	17,249	176,689	12,311	155,537
Sales.....	\$426,780	\$84,781	\$389,822	\$102,278	\$355,699	\$182,220	\$294,399	\$179,616
Direct costs.....	\$287,322	\$64,533	\$260,058	\$108,481	\$257,203	\$124,731	\$217,760	\$151,831
Net income.....	\$105,687	\$8,299	\$107,576	(\$9,840)	\$72,787	\$44,508	\$55,079	\$15,900

In computing the depletion deduction, petitioners used as the gross income from the property the gross proceeds less delivery costs and discounts from the sale of crushed and broken stone, flagstone and dry-wall, and fully processed dimension stone, and for the years 1951 through 1954, claimed \$54,840.27, \$46,294.99, \$34,074.73, and \$45,242.77, respectively. On the theory that gross income from the property in respect to the finished dimension stone must be limited to the value of rough uncut stone prior to cutting and finishing, respondent in his deficiency notice disallowed petitioners' depletion deductions to the extent of \$42,357.73, \$45,346.63, \$14,854.55, and \$41,094, respectively. By amended answer respondent ~~subordinated~~ to an alternative status the basis of his deficiency notice and placed primary reliance on his so-called "least-processing" theory with any increased deficiencies that may result to be redetermined by the Court.

Although numerous dolomite or limestone deposits occur throughout the country, only a relatively few

consist of rock that would satisfy the exacting requirements of dimension stone. Deposits with irregularly or closely spaced joints are unsuitable, as large blocks free from cracks or lines of weakness are demanded. Furthermore, only those deposits that are compact, easily workable, uniformly textured, and attractively colored merit consideration for such use. Among the dolomite or limestone deposits suitable for the extraction of stone usable for building purposes, there is a great deal of variation in the spacing and arrangement of the bedding planes, seams, and joints, and this in turn determines the size and shape of the blocks of stone which can be removed from a particular deposit. The nature of the stone deposit will also determine the processes which can be employed in its extraction and fabrication into building stone.

Bedford-Bloomington (Indiana) limestone, which is also used for building stone, occurs in large monolithic deposits running to depths of approximately 70 to 80 feet. The widely spaced joints in the stone permit its extraction in large, regularly shaped blocks. As a result the quarries in Indiana utilize channeling machines or wiresaws and produce rectangularly shaped blocks of uniform dimensions having relatively smooth faces. These rough blocks, relatively large and regularly shaped, rather than being processed and finished into dimension stone at the quarry are sold to cut-stone processors in the Chicago and Milwaukee market area.

The characteristics of the Niagara dolomite escarpment, as extensive as it is in Wisconsin, apparently make possible the extraction of only a limited amount

of stone suitable for processing into dimension or building stone. Building stone quarrying in the escarpment is largely confined to the Lannon district and a small area south of Fond du Lac, Wisconsin. And there the relatively thin horizontal bedding planes and irregular vertical seams or joints result in the production of blocks considerably smaller, more irregular, and rougher than blocks quarried in Indiana. The horizontal beds of the upper strata (the source of the building stone) of petitioners' quarry generally occurred in thicknesses of only 2 to 6 inches—only once did petitioners uncover a layer which reached 30 inches in depth. The small and irregular blocks of Lannon stone were not suitable for processing into building stone by mechanical means and were necessarily processed from the initial stages through the finished stone largely by hand.

Cut-stone processors, who cut building stone which is competitive with petitioners' finished building stone, find it uneconomical and unfeasible to purchase for processing the rough slabs or blocks of Lannon stone quarried by petitioners. From Indiana and other areas of the country the commercial processors can procure a steady and dependable supply of very large blocks of uniform shape and dimension that can be economically processed by large-scale machine operations. The character of Lannon stone generally precludes the production of blocks of this type or volume. Whereas the processing of uniformly shaped blocks of Indiana limestone involves only about 5 per cent waste, processors would be required to transport from the Lannon district quarries up to 50 per cent waste.

and then be faced with a difficult disposal problem at their processing plants. Moreover, Lannon stone is more difficult to fabricate after its natural moisture has dried out, and, therefore, has to be cut very shortly after it has been quarried; also, this stone is not readily workable on the large bedded planers, one of the more important of the processors' machines. On both counts the converse is true in the case of Indiana limestone.

As a result, there was no market among processors, or anyone else, for petitioners' rough uncut blocks of stone. It was necessary for almost all of the quarries in the Lannon area to process their own stone into finished building stone at the quarry and to sell directly to the ultimate user in order to compete with Indiana limestone.

Petitioners were one of approximately 40 operators producing building or dimension stone in the Lannon and Fond du Lac areas. Many of the quarries were operated by 1 or 2 men and the average quarry employed about 5 men. Petitioners with approximately 70 or 80 men produced 50 per cent of the building stone quarried in the Lannon district. The processes they utilized from the initial stages of quarrying through the cutting and shaping of the finished stone were similar to those used by the other building stone operators in the Niagara dolomite formation.

The first commercially marketable mineral products produced by petitioners during the years 1951 through 1954 were crushed and broken stone, flagstone and drywall, and finished dimension stone after completion of the necessary cutting, breaking, and trimming

processes, all of which were ordinary treatment processes normally applied by mine owners to obtain the commercially marketable mineral product from their raw mineral deposit.

A chemical analysis of the stone in petitioners' quarry revealed a composition averaging in content 51.72 per cent calcium carbonate, 45 per cent magnesium carbonate, and 3.28 per cent total impurities, including a silica content of 2.85 per cent. This stone found in petitioners' quarry was dolomite.

#### OPINION

There is no dispute that under section 114(b)(4), I.R.C. 1939,<sup>1</sup> and section 613(a), I.R.C. 1954,<sup>2</sup> petition-

#### <sup>1</sup> SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

##### (b) BASIS FOR DEPLETION.—

##### (4) PERCENTAGE DEPLETION FOR COAL AND METAL MINES AND FOR CERTAIN OTHER MINES AND NATURAL MINERAL DEPOSITS.—

(A) In General.—The allowance for depletion under section 23(m) in the case of the following mines and other natural deposits shall be—

- (ii) in the case of . . . dolomite . . . 10 per centum,
- (iii) in the case of . . . metallurgical grade limestone, chemical grade limestone . . . 15 per centum, . . .

of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed

[Footnote 2 on Page 57]

ers are entitled to a percentage depletion allowance on the stone that they quarried. This allowance is based on a specified percentage, depending upon the specific mineral mined, of the gross income derived from the property to the extent that it does not exceed 50 per cent of the net income ("taxable income" in I.R.C. 1954) from the property. "Gross income from the property" is defined in section 114(b)(4)(B), I.R.C. 1939, and section 613(c), I.R.C. 1954, as the gross income from mining, and "mining" is to include, in addition to the extraction of the ore or mineral from the ground, the "ordinary treatment processes normally applied by mine owners and operators in order to obtain the commercially marketable mineral product or products."

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50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance under section 23(m) be less than it would be if computed without reference to this paragraph.

(B) Definition of Gross Income From Property.—As used in this paragraph the term "gross income from the property" means the gross income from mining. The term "mining", as used herein, shall be considered to include not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products \* \* \*

<sup>2</sup> SEC. 613. PERCENTAGE DEPLETION.

(a) GENERAL RULE.—In the case of the mines, wells, and other natural deposits listed in subsection (b), the allowance for depletion under section 611 shall be the percentage, specified in subsection (b), of the gross income from the property excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per cent of the taxpayer's taxable income from the property (computed without allowance

With the objective of providing a simplified method of computing depletion allowances which would avoid the complications and difficulties arising in connection with cost and discovery depletion, Congress in 1926 introduced percentage depletion based on "gross income from the property."<sup>3</sup> The ambiguity inherent in the phrase "gross income from the property" and the dis-

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for depletion). In no case shall the allowance for depletion under section 611 be less than it would be if computed without reference to this section.

(b) **PERCENTAGE DEPLETION RATES.**—The mines, wells, and other natural deposits, and the percentages, referred to in subsection (a) are as follows:

(6) 15 percent—all other minerals (including, but not limited to . . . dolomite, . . . limestone . . . stone (used or sold for use by the mine owner or operator as dimension stone or ornamental stone), . . . except that . . . the percentage shall be 5 percent for any such other mineral when used, or sold for use, by the mine owner or operator as rip rap, ballast, road material, rubble, concrete aggregates, or for similar purposes. . . .

(c) **DEFINITION OF GROSS INCOME FROM PROPERTY.**—For purposes of this section—

(1) **GROSS INCOME FROM THE PROPERTY.**—The term "gross income from the property" means, in the case of a property other than an oil or gas well, the gross income from mining.

(2) **MINING.**—The term "mining" includes not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products . . .

<sup>3</sup> Sec. 204(c) (2), Rev. Act 1926, 44 Stat. 16; Report of Committee on Finance, S. Rept. No. 52, 69th Cong., 1st Sess., p. 17.

putes arising therefrom led to the enactment<sup>4</sup> in 1943 of the definition found in subsection (B) of section 114(b)(4), which has been carried substantially intact through the 1954 Code. Although it then became clear that the gross income upon which the depletion allowance was to be based was to include income derived from processes that went beyond mere extraction of the mineral from the ground, the basis for disputes had not been eliminated—it shifted in focus to the interpretation of the new phrase “ordinary treatment processes normally applied by mine owners and operators in order to obtain the commercially marketable mineral product or products.”

It was soon settled that “commercially marketable mineral product” meant the *first* commercially marketable mineral product resulting from the application of ordinary treatment processes. *International Talc Co.*, 15 T.C. 981; *Black Mountain Corporation*, 21 T.C. 746; *Riverton Lime & Stone Co.*, 28 T.C. 446.

In an effort to limit the scope of “mining” as defined in subsection (B), however, the Commissioner persistently attempted to distinguish and draw a line between extraction processes and manufacturing processes, arguing that the latter were not allowable “ordinary treatment processes.” The courts rejected this effort. In *United States v. Cherokee Brick & Tile Company*, 218 F. 2d 424 (C.A. 5); *United States v. Merry Brothers Brick and Tile Co.*, 242 F. 2d 708 (C.A. 5), certiorari denied, 355 U.S. 824; and *United States v. Sapulpa*

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<sup>4</sup> Sec. 124(c), Rev. Act 1943, 58 Stat. 45; Report of Committee on Finance, S. Rept. No. 627, 78th Cong., 1st Sess., p. 23.

*Brick and Tile Corporation*, 239 F. 2d 694 (C.A. 10), contrary to the Commissioner's contention that the processes by which raw clay was transformed into burnt brick and tile were unallowable manufacturing processes, it was held that fully processed brick and tile were the first commercially marketable products from the mineral involved, and that all of the processes utilized to obtain this product were ordinary treatment processes. *Dragon Cement Company v. United States*, 244 F. 2d 513 (C.A. 1), certiorari denied 355 U.S. 833, held that manufactured cement, involving a chemical change in the processing of the raw mineral, was the first commercially marketable product from cement rock. *Riverton Lime & Stone Co.*, *supra*, held that hydrated hydraulic lime was the first such product from a limestone mine. In *Townsend v. Hitchcock Corporation*, 232 F. 2d 444 (C.A. 4), pulverized talc and talc crayon were found to be the commercially marketable products obtained from ordinary treatment processes, regardless of whether they may be considered to be "manufactured" products. These and other courts were of the uniform opinion that the statutory language was clear and unambiguous, and that gross income from mining included the income from all processes ordinarily and normally applied to obtain the first product marketable in commerce. The depletion allowance not being an allowance upon any processes as such, did not necessitate distinguishing between mining processes and manufacturing processes.<sup>5</sup>

<sup>5</sup> Following denial by the Supreme Court of certiorari in *United States v. Merry Brothers Brick and Tile Co.*, 242 F. 2d 708 (C.A. 5), certiorari denied 355 U.S. 824; and *Dragon Cement Company*

Shifting his emphasis now to a new theory which would restrict the scope of the depletion allowance, respondent here argues that the first commercially marketable mineral product in any particular mining industry is the crudest, least processed product for which a commercial market exists in the United States in more than negligible quantities, and that the processes utilized and normally applied by mine owners and operators in that industry to produce this crudest marketable product are the only processes which can be considered to be ordinary treatment processes within the meaning of the statute. To ascertain the crudest, least processed, yet marketable, product for the particular mineral industry involved, respondent would look to the country as a whole. Once the product base had been determined for an entire industry it would serve as the standard for all of the producers of that mineral, notwithstanding that an individual miner or operator may not produce or market it or be capable of marketing it at a profit. Those who processed and marketed a product other than the standard industry product would be required to utilize as their depletion base a gross income reconstructed by reference to the representative market price of the crudest, least processed marketable product from a mineral of like kind and grade, or if there is no such market price, respondent would allocate and eliminate on the basis of costs all income attributable to processes beyond those necessary to produce the crudest product.

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*v. United States*, 244 F. 2d 513 (C.A. 1), certiorari denied 355 U.S. 833, Internal Revenue Service announced that the decisions in the "brick and tile" cases would be accepted and followed. T.I.R. 62, Oct. 18, 1957.

For the dolomite and limestone industry, then, respondent shows that the crudest, least processed product marketed in more than negligible quantities is crushed and broken stone. The processes normally applied by limestone and dolomite operators to obtain crushed and broken stone, respondent contends, are the only "ordinary treatment processes" contemplated by the statute. This would be so in spite of the variety of products which may be and are in fact produced from a limestone or dolomite mine. Thus in petitioner's case the gross income from the sales of their crushed stone would all be includible in the depletion base. On the other hand, respondent insists, income from the sale of building or dimension stone, a more highly refined product utilizing processes quite different from those required to produce crushed stone, would be excluded to the extent of the income attributable to the additional processing steps—that is, income from the sale of building stone must be limited to the income that would have been derived if such stone had been sold as crushed and broken stone.

The so-called "least-processing" theory appears to have first been advanced by respondent before the Seventh and Eighth Circuits in his appeals from the District Court's decision in *Cannelton Sewer Pipe Co. v. United States*, 268 F. 2d 334 (C.A. 7), and from this Court's decision in *Commissioner v. Iowa Limestone Co.*, 269 F. 2d 398 (C.A. 8), affirming 28 T.C. 881, both of which were still pending when the case here before this Court was submitted. Since then both appellate tribunals have handed down their decisions and both totally rejected respondent's interpretation.

In *Cannelton*, the taxpayer mined fire clay and shale and manufactured therefrom vitrified clay sewer pipe and related products. The income derived from the sale of his fully processed products was used as his basis for depletion. The Government urged that since there was an existing substantial market for raw clay and shale in the immediate area, as well as in the State of taxpayer's mine, the raw unprocessed mineral was his first commercially marketable product. The court pointed out that taxpayer's mining costs alone, due to a more expensive underground type of operation, exceeded the current selling price of raw clay and shale, and in view of this fact was unable to understand how raw clay and shale could be considered commercially marketable products for this particular taxpayer. In the Court's view, taxpayer had to be in a position to sell his product at a profit before it was "commercially marketable," and in order to achieve this end, taxpayer found it necessary to further process his raw material into vitrified clay sewer pipe. The evidence also showed that integrated mining and manufacturing operations wherein the raw material was processed by the mining operators into a finished product was the rule rather than the exception in taxpayer's area in the year involved, and that the treatment processes used to obtain his finished products were ordinary and normal. In rejecting respondent's contention that there can be only one depletable or commercially marketable product for each mineral, the court said:

The short answer to this is that we do not agree that it was intended that the depletion allowance for each mineral be reduced to the common de-

nominator represented by a conceivable product most cheaply produced from each mineral.

Again respondent urged in *Iowa Limestone* that the crudest, least processed product marketable from taxpayer's limestone quarry was crushed limestone, even though taxpayer marketed only finely ground, or pulverized chemical grade limestone. Although there clearly was a market for crushed limestone for road and agricultural purposes and taxpayer's stone could have all been crushed and utilized for such purposes (as a minor amount of dirty and contaminated material was), his deposit of limestone was a relatively rare and special type particularly suitable for chemical use. In its pulverized form processed for chemical use, the limestone was considerably more valuable and commanded a higher price than crushed stone. The court was of the opinion that the taxpayer—

had the right to market its chemical grade limestone for the purpose for which it was most suited and in a field where it would command a fair price. Gold, silver, and iron ores and other valuable minerals could doubtless be sold for road rock, fill, or ballast, but no one would contend that their value must be determined upon such a limited use of such products. It was not economically feasible for the taxpayer to market its superior stone as ordinary road rock. Many kinds of cheap stone would equally serve such a purpose.

While there are some differences in the facts in those two cases and in this case, the courts in those

cases specifically rejected substantially every argument advanced by respondent in this case in support of his most recent theory, and we think the principles announced in those decisions are equally applicable here.

In both of those cases the courts rejected the argument that the one most cheaply produced product of the mineral that could be produced and sold at a profit by someone somewhere in the country was the commercially marketable product for all taxpayers in that industry, regardless of whether it was economically feasible for the particular taxpayer to produce and market that product at a profit. Both courts stated that the profit-making aspect must be given consideration in determining whether a mineral product is commercially marketable, and that the taxpayer has a right under the statute to market its mineral for the purpose for which it is most suited. We agree. *Riverton Lime & Stone Co., supra*; *Iowa Limestone Co.*, 28 T.C. 881.

In *Iowa Limestone*, the Court of Appeals also rejected respondent's argument that for depletion purposes all types of limestone must be considered the same mineral. We agree that the depletion base of a taxpayer is not limited to the gross income that would be produced by the sale of the most inferior grade of the mineral produced by him, but is the gross income that would be produced by the sale of the first commercially marketable products of the mineral produced for the purposes for which it, in its natural state, is best suited. Here the finished building stone was not merely the product of extended crushed stone processing, but originated in the raw material itself, so formed

as to be peculiarly adaptable to building purposes, and the processing took an entirely different course from the beginning. This case is, therefore, distinguishable from *Black Mountain Corporation, supra*, where the Court disallowed income attributable to oil treatment of coal, and *Sparta Ceramic Company v. United States*, 168 F. Supp. 401 (N.D. Ohio), wherein the court disallowed the glazing of tile, because in those cases the processes disallowed were additional processing of already marketable products to produce a more expensive product.

We find no inequity in allowing a taxpayer who has a high-grade mineral a greater depletion base than one who has a lower grade of the same mineral. Depletion is designed to permit a taxpayer to recover the value of his wasting asset mined and removed. *Anderson v. Helvering*, 310 U.S. 404; *Dragon Cement Company v. United States, supra*. Petitioners here, with a dolomite suitable in part for building stone, have a greater value to recover than would a person who owned a quarry with dolomite suitable only for crushed stone purposes. For respondent to say that there is no more exhaustion of the mineral deposit through the extraction of a ton of stone suitable for building purposes and a ton of stone which may be used only in crushed form is to ignore the difference in economic value between each ton.

We believe Congress recognized that the value of natural resources might fluctuate widely, depending upon their accessibility or the products which they are capable of yielding, by making the gross income from the property serve as the base for computation. Respond-

ent would deny this result by his "least-processing, single product" theory. If Congress, in its quest for simplicity, had intended the result prescribed by respondent it could have more simply specified the single product which was to form the basis for depletion for any particular mineral industry. It is no answer to say that differences in the value of natural resources are taken care of in the rate of depletion. Respondent claims that all dolomites should be allowed the same rate of depletion, so under his theory there would be no recognition at all of differences in value of various types or grades of dolomite.

One distinction in the facts in this case and the *Cannelton* and *Iowa Limestone* cases which respondent emphasizes is the fact that petitioners here actually produced crushed stone in their larger quarry and could in all likelihood have crushed the building stone and marketed it at a profit in that form, whereas in *Cannelton*, petitioner could not have marketed raw fire clay at a profit, and in *Iowa Limestone*, petitioner did not actually market its limestone as crushed stone, although it could have been so marketed. But both cases established that the depletion allowance for a mineral need not be limited by a product most cheaply produced from the mineral and that a taxpayer has the right to market his mineral for the purpose for which it is most suited. And that the depletion base for a taxpayer may consist of income from the sales of more than one product has been uniformly recognized by other courts. *United States v. Cherokee Brick & Tile Company, supra*; *United States v. Sulpita Brick and Tile Corporation, supra*; *United*

*States v. Merry Brothers Brick and Tile Co., supra; Townsend v. Hitchcock Corporation, supra; Richland Shale Products Company v. United States*, 168 F. Supp. 731 (E.D. S.C.); *Arronia-Buckingham Slate Company v. United States*, 167 F. Supp. 903 (E.D. Va.); *Can-  
nelton Sewer Pipe Co. v. United States, supra*. To rely on the factual distinction above mentioned would suggest the absurd result that petitioners would be entitled to less depletion on their building stone in their main quarry where the crusher was located than on their building stone in their smaller quarry where there was no crusher; and less than other smaller building stone producers in the area are entitled to on their building stone of like quality just because they had no crusher.

Respondent argues in the alternative that if crushed stone is not the first commercially marketable product for all of petitioners' stone, then rough uncut stone is the first marketable product for their building stone, and that either the selling price of their drywall stone, or a representative price of rough uncut blocks of dolomite and limestone suitable for processing into finished building stone should be used as their basis for depletion.

It is clear from the evidence that it would be economically unfeasible, and probably impossible as well without a great deal of waste, for petitioners to attempt to cut their dimension stone into either flagstone or drywall. Petitioners sell all of their stone that is suitable for this purpose as flagstone or drywall because it requires no processing. Because it requires no processing, it can be sold for less than it costs petitioners

to process even their building stone. While flagstone and drywall may be the cheapest to produce and first commercially marketable product of petitioners' quarry, that does not make it the first commercially marketable product of that part of petitioners' mineral deposit suitable for building stone.

The evidence also indicates that there is virtually no market for uncut Lannon building stone, principally because only about 25 per cent of it can be made into usable building stone, and it would cost a stone processor too much to transport and store the waste. The market for rough stone was created by stone of an entirely different type, principally Indiana limestone, which is capable of being quarried in large blocks of uniform dimensions and can be processed into building stone with relatively little waste and after a considerable lapse of time. We feel that petitioners have established that the rough uncut blocks of their Lannon stone were not commercially marketable until cut or sawed into finished dimension or building stone. If we were to hold otherwise we see no reason why the price of rough uncut stone should not be applied to the entire tonnage of the uncut building stone produced by petitioners at the time it is first separated from its natural deposit and before any of it is broken into waste, and we feel this would produce an unrealistic and un contemplated result.

Application of respondent's crudest, least-processed theory uniformly throughout the building stone industry would require use by most of the producers in the Milwaukee area of entirely hypothetical gross income and net income figures to establish their depletion al-

lowances. The statute refers to the "gross income from the property" and the "net income of the taxpayer \* \* \* from the property." Sec. 114(b)(4)(A), I.R.C. 1939. We do not think this calls for use of hypothetical income figures when the income of the taxpayer from his property is ascertainable from his own receipts and expenditures.

We hold for petitioners on this issue. By doing so, however, we do not intend to imply that a producer of building stone may include in gross income from the property for depletion purposes the entire sales price of his finished stone regardless of the amount of processing used to produce it. The selling price of the stone processed to the point that it is commercially marketable for the purpose for which it is best suited should be the basis for depletion. We do not have sufficient evidence before us in this record to determine whether the apparently negligible amount of ornamental stone, or "specials," sold by petitioners were the first commercially marketable products within the meaning of the statute or were refinements of a commercially marketable product, and we are not deciding that here. The parties have stipulated the figures to be used as gross income if we sustain petitioners' position that they are entitled to compute depletion on the basis of their gross income from sale of crushed stone, after all crushing operations, plus sales of building stone after all cutting processes have been performed. Inasmuch as we have found that the basis for computing percentage depletion used by respondent in his notice of deficiency, being a hypothetical selling price of rough uncut stone, is not correct, the presumptive

correctness of respondent's determination has been overcome and the only evidence we have before us favors petitioners' method of computing their gross and net income for depletion purposes.

The remaining issue concerns the proper percentage depletion rate to be applied to petitioners' product for the years 1951 through 1953 under the Internal Revenue Code of 1939. As a result of revisions in the 1954 Code and a more explicit delineation of the mineral categories applicable to petitioners' products, the parties are in agreement as to the rates to be applied for the year 1954. In respect to the earlier 3 years, respondent determined that the rock quarried by petitioners was limited to the 10 per cent rate provided for dolomite. Petitioners agree that the rock was dolomite, but argue that it also qualified as "metallurgical grade limestone, chemical grade limestone"<sup>6</sup> and is entitled to the higher 15 per cent rate provided for in the statute.

The essential constituent of limestone rock is calcium carbonate. When the rock also contains in addition magnesium carbonate to the extent of 35 or 45 per cent of its composition, it is known as dolomite. *Virginian Limestone Corporation*, 26 T.C. 553; *Blue Ridge Stone Corporation v. United States*, 170 F. Supp. 569 (W.D. Va.). There is little question that the rock quarried by petitioners, with a magnesium carbonate content of 45 per cent, was dolomite and is clearly entitled to at least the 10 per cent rate specifically provided for by section 114(b)(4)(A)(ii). The question

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<sup>6</sup> For convenience, hereafter referred to as "metallurgical or chemical grade limestone."

of first impression before us, however, is whether dolomite can at the same time be a "metallurgical" or "chemical grade limestone" under the statute, and if so, whether Congress intended the 10 per cent or 15 per cent rate to apply to a dolomite so qualifying.

The legislative history of the Act by which this mineral was added to the depletion statute in 1951 gives only general guidance as to what was intended by Congress. The Report of the Senate Committee on Finance on the Revenue Act of 1951 (S. Rept. No. 781, 82d Cong., 1st Sess., p. 38) stated: "The names of all the various enumerated materials are of course intended to have their commonly understood commercial meaning." The conference report on this Act (H. Rept. No. 1179, 82d Cong., 1st Sess., p. 75) contained the following language:

It is intended, in any case where a mineral is specifically provided for at a stated rate of percentage allowance, that the specific provision will govern the allowance provided (whether higher or lower) for a more general classification.

However, the legislative history gives no clue as to what was intended to be included in the terms "chemical grade" and "metallurgical grade" limestone. *Wagner Quarries Company v. United States*, 154 F. Supp. 655, affirmed per curiam 260 F. 2d 907 (C.A. 6).

There apparently is no generally accepted and commonly understood commercial meaning of metallurgical or chemical grade limestone. The quality or composition of limestone required by the various industries utilizing it for its metallurgical or chemical properties

varies considerably with the industries or the use to which it would be put. While petitioners' expert witness in this case testified that he thought the term "limestone" is often used to include dolomite and that a dolomite having a combined magnesium and calcium carbonate content of 95 per cent could qualify as a chemical or metallurgical grade limestone, he also stated that a customer ordering chemical or metallurgical grade limestone would usually specify the minimum content of either magnesium or calcium carbonate and the maximum impurities acceptable. On the other hand, respondent's expert witness testified that a mineral or stone having the above composition would not be commonly understood to be chemical or metallurgical grade limestone.

We do not believe it is within our province to assume that Congress intended to include a high-grade dolomite within the classification chemical or metallurgical grade limestone when it specifically granted a 10 per cent rate to dolomite. This would be true even if we accept petitioners' contention that the term "limestone" is commonly understood to include dolomite and that dolomite with a combined carbonate content of 95 per cent would qualify as a chemical or metallurgical grade limestone. Absent some evidence that Congress intended the latter phraseology to encompass high-grade dolomite and thus overlap the term "dolomite" specifically used in the 10 per cent category, we will apply the concept stated in the conference report quoted above that when a 10 per cent rate was specifically provided for dolomite, that rate shall apply to all dolomite, whether it could also be classified as stone entitled

to a 5 per cent rate, as argued by respondent in *Virginian Limestone Corporation, supra*, or as chemical or metallurgical grade limestone entitled to a 15 per cent rate, as argued by petitioners here.

The more recent cases which have considered this particular question are not controlling because they did not involve a mineral which qualified as a specifically mentioned mineral as well as a chemical or metallurgical grade limestone. In *Iowa Limestone Co., supra*, it was held that a limestone which is at least 95 per cent pure, free from toxic impurities and containing not more than 1 per cent moisture, is known in industry and commerce as chemical grade limestone; but there the mineral contained at least 95 per cent calcium carbonate and hence was not dolomite. In *United States v. Wagner Quarries Company*, 260 F. 2d 907 (C. A. 6), the Court of Appeals said that "a reasonable interpretation of congressional intent in using the words 'metallurgical grade limestone, chemical grade limestone,' would mean limestone of high carbonate content with a very low silica or impurities percentage, capable of use for metallurgical or chemical purposes." But the mineral there involved was about 85 per cent calcium carbonate and 10 per cent magnesium carbonate, and thus was not dolomite.

On the other hand, this Court held in *Virginian Limestone Corporation, supra*, that if the mineral qualified as dolomite, it was entitled to the 10 per cent rate even though it might also be considered "stone," "calcium carbonates," or "magnesium carbonates" because the term "dolomite" is a term of specific designation while the others are terms of general classification. We

recognize that the terms "chemical" and "metallurgical grade limestone" are not as general a classification as "stone." Nevertheless, petitioners' stone is dolomite and we do not think Congress intended that such a specifically designated mineral should be allowed a 15 per cent rate because it might also qualify as a chemical or metallurgical grade limestone any more than it should be limited to a 5 per cent rate because it also qualifies as stone. We stated in the *Virginian Limestone* case that the "provisions of the statute here involved are specific and free from ambiguity. In such situation, there is no room for an interpretation, by the Commissioner or by the Courts, which would vary (either upward or downward) the stated rates for specifically identified minerals, which Congress has provided." We reaffirmed that finding and that rule of statutory construction in *Spencer Quarries, Inc.*, 27 T.C. 392, dealing with quartzite. We believe they are equally applicable here.

The 10 per cent depletion rate allowed in the case of dolomite is applicable to all of petitioners' production here involved during the years 1951, 1952, and 1953.

*Decisions will be entered under Rule 50.*

## Part C: Legislative Materials

### Joint Committee Report, 1930

(Report to the Joint Committee on Internal Revenue Taxation From Its Staff, *Preliminary Report on Depletion*, vol. I, pt. 8 (1930))<sup>1</sup>

#### [12] METHODS PROPOSED FOR CONSIDERATION.

Inasmuch as the present system of depletion has been shown to be neither simple in its application nor equitable in its results, it is desirable to find a substitute for this system. Several methods have been proposed and considered, each one of which will be discussed.

(a) *Fixed rate per unit method.*—The first method proposed for consideration is the fixed rate per unit method. This method, as its name implies, consists of the allowance of a fixed amount per pound for the mineral sold. For example, assume that copper is worth 2 cents a pound in the ground, lead 1 cent a pound, coal 3 cents per ton, gravel 1 cent per ton—if a company sold 1,000,000 pounds of lead in the taxable year, its depletion allowance would be 1,000,000 pounds times 1 cent, or \$10,000. While this method has never been adopted in the United States, it nevertheless is applied by Canada in determining the depletion allowance for coal.

One of the chief objections to the fixed rate per unit method is the great changes that would follow from its

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<sup>1</sup> This report was originally published in 1929 and was then reprinted in 1930. Since the Government in its Appendix B (pp. 66-87), uses the 1930 pagination, we have also used such pagination in order to avoid confusion.

application. The following table shows the various units of depletion per pound at present allowed in the case of copper:

[13]	\$0.0232	\$0.0050	\$0.0027	\$0.0211	\$0.0465	\$0.0243
	0138	0099	0171	0233	0411	0129
	0279	0040	0221	0058	0197	0320
	0215	0244	0151	0291	0331	0119
	0195	0199	0132	0264	0310	0122
	0206	0042	0138	0179	0162	0367
	03	0081	0360	0189	0217	0080
	0148	0289	0373	0206	0407	
	0047	0141	0776	0265	0551	
	0191	0193	0843	0108	0272	

The mathematical average of the above depletion units is 0.0259. The highest depletion unit in the list is 0.0843 and the lowest is 0.0027. It is evident from the wide range in depletion units allowed under the present system that the new method would make a very great change in the depletion allowance in many cases if fixed depletion unit per pound is adopted. Furthermore, a depletion unit of  $2\frac{1}{2}$  cents per pound will in many instances completely wipe out the tax. To offset this, an arbitrary limitation would have to be imposed. Another difficulty in the method is the distribution of the depletion allowance between the lessor and the lessee in the case of leaseholds. A third criticism might be advanced on the ground that the allowance for depletion would bear no relation to the value of the ore, as a rich and valuable deposit would receive no greater depletion allowance than a low-grade deposit of practically no value.

**Revenue Act of 1943: Presidential Veto Message, 1944**

(90 CONG. REC. 1958, 1959 (1944))

**[1958] TO THE HOUSE OF REPRESENTATIVES**

I return herewith, without my approval, H. R. 3687, entitled "An Act to Provide Revenue, and for Other Purposes".

I regret that I find it necessary in the midst of this great war to be compelled to do this in what I regard as the public interest.

\* / \* \* \*

**[1959]** The bill is replete with provisions which not only afford indefensible special privileges to favored groups but sets dangerous precedents for the future. This tendency toward the embodiment of special privileges in our legislation is in itself sufficiently dangerous to counter-balance the loss of a very inadequate sum in additional revenues.

Among these special privileges are:

\* \* \* \*

(b) Percentage depletion allowances, questionable in any case, are now extended to such minerals as vermiculite, potash, feldspar, mica, talc, lepidolite, barite and spodumene. In the case of some of these minerals the War Production Board refused to certify that current output was inadequate for war needs.

\* \* \* \*

In the interest of strengthening the home front, in the interest of speeding the day of victory, I urge the earliest possible action.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE, *February 22, 1944.*

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**House Hearings, 1947**

*(Hearings Before the House Committee on Ways and Means on H.R. 1993, 80th Cong., 1st Sess. (1947))*<sup>2</sup>

[41]

House of Representatives  
Select Committee on Newsprint  
and Paper Supply  
Washington, D. C.  
June 12, 1947

HON. BERTRAND W. GEARHART,  
New House Office Building

MY DEAR COLLEAGUE:

\* \* \* \* \*

Thenardite, a nonmetallic mineral commonly known as sodium sulphate, is absolutely essential in the manufacture and production of newsprint and kraft paper . . . .

\* \* \* \* \*

Briefly, the situation now facing the newsprint and paper manufacturers is this: Without an adequate supply of this mineral, many paper mills will be com-

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<sup>2</sup> The Government in its Appendix B (pp. 231-34) quotes from these Hearings but omits the portion set forth below.

pelled to discontinue operations. Much of the newsprint paper has been imported from Canada. There has been an expanding development in this country in the manufacture of paper in the Southern States, utilizing cut-over timberlands which replenish themselves with new growth suitable for this purpose every 10 years. The Government has encouraged this development as a measure to conserve the timber suitable for lumber, which requires over 20 years' growth. Commendable advances have been made in this reforestation and conservation endeavor. We find paper mills utilizing this cut-over timber in Florida, Georgia, Alabama, Mississippi, Louisiana, and Texas and they require many thousands of tons of sodium sulphate. Otherwise, the material produced would be too tough for commercial use.

This committee is convinced that if newsprint and paper is to continue to be available for supplying the steadily increasing demand by the people of our Nation, some incentive must be furnished to encourage exploration and production of sodium sulphate. We believe that incentive can best be furnished by tax relief and that a percentage depletion allowance would furnish the most effective stimulus. The producer must be permitted to foresee a return of his capital, plus a reasonable profit in order to encourage mining investments.

[42]

CLARENCE J. BROWN,  
*Chairman, Select Committee on  
 Newsprint and Paper Supply.*

## House Hearings, 1947

*(Hearings Before the House Committee on Ways and Means on Revenue Revisions, 1947-48, 80th Cong., 1st Sess., pt. 5 (1947))*

[3281] Statement of L. H. PARKER on Behalf of the Special Committee on Taxation, National Coal Association, Washington, D. C.<sup>3</sup>

Mr. PARKER. \* \* \*

[3282] Thank you, Mr. Chairman, and I file this statement for the record.

Mr. WOODRUFF. That will be included as a part of your remarks, Mr. Parker.

(The statement referred to is as follows:)

TECHNICAL AMENDMENTS TO THE INTERNAL REVENUE CODE SUGGESTED BY THE SPECIAL COMMITTEE ON TAXATION, NATIONAL COAL ASSOCIATION, WASHINGTON, D. C.

\* \* \* \* \*

[3283] When the percentage depletion provisions applying to coal and metal mining were first made a part of the revenue statutes in the Revenue Act of 1932 and reaffirmed in the Revenue Act of 1934, the definitions of "Gross income from the property" and "Net income from the property", upon which the allowable computations of percentage depletion are based, were left by Congress for inclusion in the

<sup>3</sup> The Government in its Appendix B (p. 245) quotes a portion of the following statement submitted by Mr. Parker, but omits the portion set forth below.

regulations by the Commissioner of Internal Revenue.

The mine operators protested the definitions drafted by the Commissioner for inclusion in the regulations on the grounds that they did not express the clear intent of Congress. As a result, a group of mine operators and their representatives met with the officials of the Treasury late in December 1932 to discuss the matter. In this conference, it was agreed the definitions drafted by the Commissioner did not express the intent of Congress. However, as the regulations containing the definitions drafted by the Commissioner had, in the interim, been printed in bound form and been delivered to the Treasury Department and were ready for issuance, the Treasury representatives expressed reluctance to withdraw said regulations on the ground such a change could not be made and have the regulations issued in time for use in connection with the returns due to be filed March 15, 1933. To meet this situation, it was proposed that the regulations be issued as printed with the understanding the definitions would be interpreted and applied according to the meaning of the act as agreed to in that conference. The operators agreed to this procedure. The regulations were thus issued and the definitions were applied as agreed to up to about the latter part of 1938.

Beginning in about 1938 and progressively over subsequent years, the Commissioner of Internal Revenue made various changes in the interpretation and application of these definitions contained in the regulations, all detrimental to the mining operator entitled to an allowance as depletion. Some of these changes were covered by rulings issued by the Commissioner. How-

ever, in the main, the Commissioner merely took the position that his prior allowances had been contrary to the expressed wording of the regulations and the changes being made were for the purpose of complying with them.

\* \* \* \* \*

**House Hearings, 1950**

*(Hearings Before the House Committee on Ways and Means on Revenue Revision of 1950, 81st Cong., 2d Sess., vol. I (1950))*<sup>4</sup>

[470] Statement of Hon. HARRY P. O'NEILL, a Representative in Congress from the State of Pennsylvania.

House of Representatives,  
Washington, D. C., February 14, 1950.

Mr. Charles W. Davis,

Clerk, House Ways and Means Committee,  
House of Representatives, Washington, D. C.

DEAR SIR: I respectfully desire to make known to your committee my very deep concern in the matter of proposals under consideration for the reduction in depletion allowance, and their significance to the anthracite coal industry.

This underground mineral is found, in its marketable condition, only by the most expensive, hazardous, and speculative methods of search and exploration. This cost is met by private capital, and so the speculator expects, as he finds a profitable seam of coal, to be

<sup>4</sup> The Government in its Appendix B (pp. 249-64) quotes from these Hearings but omits the portion set forth below.

permitted to, at least, repay himself for the gamble, as quickly as possible. The only method is by depletion allowance, as no public grant is available to the discoverer for his time, trouble, and money.

The only known acceptable method of keeping a successful explorer in his line of business, looking for more marketable veins, is the inducement of depletion allowance. He must be reimbursed and see a profit opportunity, or he will leave the search to another. The other will have to be public funds.

Who is there to sink a shaft deep into the earth to look for a merchantable mineral, a shaft safe enough to comply with State and Federal mine safety laws, that does not expect every opportunity to get even, and show a profit? If the seam is not found the entire venture is a total loss. This happens continually, and is as much a part of the industry as the fact that coal burns.

That coal is a required commodity, and particularly for war use, is not deniable. Examination of the bills of lading of any colliery will convincingly prove that the consignee is a vital factor to his country.

The enclosed letter from one of the largest independent producers in the anthracite fields is expressive and deserves the utmost consideration. The owners, Robert and Kenneth Moffat, can furnish any sound technician your committee may select, proof beyond any doubt that depletion as it stands is sound, and that it will be dangerous to private capital to interfere with the current standard.

We need more competent explorers in this field. Let us not rock the boat. Kindly make the Moffat Coal Co.

letter, and my own, a part of your record; so that they can be brought to the attention of every member of the committee.

Sincerely yours,

HARRY P. O'NEILL, M. C.

\* \* \* \* \*

### House Hearings, 1951

*(Hearings Before the House Committee on Ways and Means on Revenue Revision of 1951, 82d Cong., 1st Sess., pt. 3 (1951))*

[1537] Statements of J. RUTLEDGE HILL, Dallas, Tex., Chairman of the Committee on Taxation, National Sand and Gravel Association, and CHARLES E. BRADY, Salisbury, N.C., Vice Chairman of the Committee on Taxation, National Sand and Gravel Association:<sup>5</sup>

\* \* \* \* \*

Mr. HILL. In behalf of the commercial sand and gravel industry of the United States, I ask your committee to recommend to the House that sand and gravel be added to the list of nonmetallic minerals entitled to percentage depletion.

\* \* \* \* \*

[1538] Cost depletion does not scratch the surface of our problem. The cost of acquisition of new sand and gravel deposits, it is revealed by a sample check, has quadrupled in the past 10 years. The cost [1539] of

<sup>5</sup> A portion of this statement is included in Gov't App. B, pp. 288-89.

exploration for new sand and gravel reserves have increased in the same proportion. Many companies in our industry face the problem of survival in the sand and gravel business because deposits are being exhausted at a time when new sources of supply cannot be found. I say in the utmost seriousness to your committee that cost depletion for the sand and gravel industry is wholly inadequate.

The company of which I am president has operations in the southwestern part of the United States. In the 5-year period ended December 31, 1950, we invested in exploration for, and development of, new sources of supply and in new sand and gravel reserves a sum of money greater than our depletion and depreciation reserves plus over 80 percent of our entire net profits for those 5 years.

Today we have fewer sand and gravel operations, and smaller and poorer sand and gravel reserves, than we had 5 years ago, notwithstanding the fact that military and civilian demands for sand and gravel to support a great construction program will be especially acute this year and in succeeding years. This is the story for my own company, but it is a common story for the sand and gravel industry.

Our problem is aggravated by the higher corporate, normal, surtax, and excess-profits-tax rates now in effect. These rates may be on the statute books for a long time. Yet the sand and gravel industry, if it is to do the job which the country expects, must make substantial investments for exploration and in the location and acquisition of expensive plants on uncertain and possibly poorer deposits.

Unless sand and gravel receives a percentage depletion allowance in the requested amount, there will be many parts of the United States in which commercially usable sand and gravel will not be available.

\* \* \* \* \*

[1542] Statement of JAMES W. HALEY, Secretary, Special Tax Committee, National Coal Association, Washington, D. C.:<sup>6</sup>

Mr. HALEY. \* \* \*

[1544] We are here today to urge the Congress to reduce this inequitable treatment between coal and its competitors by increasing the depletion rate for coal to 10 percent.

\* \* \* \* \*

In times of national emergency the coal industry is called upon to fuel the Nation's economy—it is the only really flexible source of fuel supply. In addition to taking care of the increased steel production and its normal markets, coal must take over many of the markets which oil and gas are in wartime unable to supply. In order that the coal industry of this Nation may maintain an economy sufficiently healthy to permit this rapid expansion, the tax structure must permit adequate reserves for the procurement of new coal lands and for the opening of new mines.

In order for capital to be available to an industry, either the rate of return must be reasonable or some return must be certain. In the coal industry there obviously is no certainty of a profit.

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<sup>6</sup> A portion of this statement is included in the Gov't App. B, p. 289.

Therefore, to allow this industry to remain in a position to meet the wartime needs of the Nation, the tax structure must be such as to permit a reasonable compensation for the increased use of its wasting asset—coal. A 5-percent depletion allowance is wholly inadequate.

[1545] Raising the depletion on coal from 5 to 10 percent will be beneficial to the coal-producing industry in that it will afford to the industry an opportunity to acquire some reserve with which to maintain its physical properties. Certainly the value of coal, like the value of everything else, has increased in the last 10 years. Moreover, the acquisition and gaining of desirable coal properties has become in recent years increasingly difficult and expensive.

Raising the depletion rate for coal to 10 percent will not only remove a long standing and aggravated inequity, it will also help labor in that it will mean more running time and more employment.

Moreover, it will be beneficial to coal consumers. In the long run it will enable the coal suppliers to offer coal to consumers at a relatively lower price. Due to the highly competitive nature of the coal-mining industry, this is certain to be the case.

It should always be remembered in the case of percentage depletion that the taxpayer never gets tax exemption or a subsidy free of taxation, because such depletion allowances are under the law limited to 50 percent of the net income from the property.

[1550] Mr. SIMPSON. \* \* \*

Do you believe that a 5-percent increase would begin to solve the problem? I am surprised that you do not ask for 15 percent.

Mr. HALEY. Well, I think we could make a pretty good case for 15 percent, but we certainly think as a minimum 10 percent will be helpful to us.

I should like to state also that, as the Congressman no doubt realizes, the depletion is limited to 50 percent of the net income and if it were any higher than 10 percent the 50-percent limitation would limit us anyway.

Mr. SIMPSON. Now, this will cover money used for exploration and examination in seeking new sources of fuel?

Mr. HALEY. For the actual purchase of new properties. The depletion reserve is for the purpose of acquiring new properties when the current mine properties are exhausted.

Mr. SIMPSON. Is that area not being developed as it should be? That is, are you not searching now and acquiring new properties as you should, as good business would dictate?

Mr. HALEY. We certainly are. But we find every day that the depletion reserve is wholly inadequate to procure a new property.

Mr. SIMPSON. Then if we fail to increase this, we are limiting the industry in what good business would dictate as the proper amount to spend in seeking out reserves; is that correct?

[1551] Mr. HALEY. Yes, sir.

I think that is a very necessary step, particularly at this time.

Mr. SIMPSON. From a consumer's standpoint where there is the possibility of some savings in cost and from the national welfare standpoint in the interest of keeping up large reserves that are easily obtainable in bituminous coal, it would seem that this would be desirable legislation.

[1566] Statement of PHILIP L. CORSON, G. & W. H. Corson, Inc., Plymouth Meeting, Pa.:<sup>7</sup>

Mr. CORSON. My name is Philip L. Corson, and I am president of G. & W. H. Corson, Inc., of Plymouth Meeting, Pa.

Mr. CORSON. We manufacture lime, refractories, and limestone products from our quarry located near Philadelphia, Pa.

As a businessman I fully appreciate the problem before this committee and we in the limestone industry are perfectly willing to bear our share of whatever taxation must be imposed for the defense effort. I believe that the expansion in the limestone industry which will result from the elimination of the inequity which has so long existed—that of not being granted percentage depletion while so many other less essential minerals have received this treatment for years—will result in a greater return of revenue to the Federal Government, and, therefore, in behalf of the National Lime Associa-

<sup>7</sup> A portion of this statement is included in the Gov't App. B. p. 388.

tion, I am renewing its request that percentage depletion at the rate of 15 percent be provided for metallurgical and chemical limestone.

Steel is the basic sinew of war and to meet the needs of a rapidly expanding steel industry, the development and production of high grade metallurgical limestone must be greatly stepped up and expanded. Steel cannot be manufactured without limestone. There is no substitute for this basic material.

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[1567] It is therefore essential that a real incentive be furnished not only to promote the prospecting and development of new sources of limestone, [1568] but also to aid in increasing production of known deposits and to prevent the present high tax rates from actually depressing the production rate of this industry. This can be accomplished by allowing percentage depletion for chemical and metallurgical limestone, and by also according to it the same excess-profits-tax relief given to coal, metals, natural gas, and timber with excess output.

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[1571] Statement of DONALD A. CALLAHAN, Representing the American Mining Congress, Washington, D. C.: \*

Mr. CALLAHAN. \* \* \*

[1573] What we of the mining industry ask is that there be no curtailment of the modest depletion allowance now effective, but rather an increase in such allow-

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\* A portion of this statement is included in Gov't App. 'B, pp. 290-95.

ance and a liberalization of the laws applicable to mining operations so as to restore the incentive to search for and [1574] develop hidden mineral deposits and an assurance that we can go ahead in this difficult and financially hazardous business without the constant threat of impairment of our position once we have made our investments and entered upon our operations. We ask an opportunity to maintain a healthy and vigorous mining industry so vital in the present emergency and so essential to the future welfare and security of our country.

\* \* \* \* \*

I also ask, gentlemen, to be permitted to file a booklet on Mining Taxation, prepared by the American Mining Congress in February 1950, and a statement on "Depletion of Mines," recently prepared by the same organization.

\* \* \* \* \*

#### MINING TAXATION—CHANGES IN FEDERAL TAX LAWS NEEDED TO ENCOURAGE MINING ENTERPRISE

\* \* \* \* \*

The importance of encouraging mineral exploration, development, and research as a matter of national policy can hardly be overemphasized. During World War II our mines were called upon for extremely heavy production to provide the basic materials without which the war could not have been fought nor our civilian economy carried on. In meeting this enormous demand, available manpower was concentrated on production from known ore reserves, and the normal development of reserves for the future had to be sacri-

ficed. Today, in order to replace the reserves used up during the war and to maintain a strong and productive mining industry for the future, large amounts of capital must be spent in developing extensions to existing mines, in finding and bringing into production new mines, and in working out improved methods of prospecting, mining, and ore treatment. Unless this is done, our future supply of essential metals and minerals, and our national security itself, may be seriously endangered.

Tax revisions which will help remedy the present critical situation, by restoring the incentive for venture capital to undertake renewed exploration, development, and research, are accordingly matters of primary national interest. Certain important tax changes needed to accomplish this purpose are noted below.

[1575] It should be emphasized that, over the long run, these changes will not reduce Government revenue; rather, by creating new mining enterprises, new employment, additional sales of machinery and supplies, additional freight traffic, and additional business for farmers, merchants, and service industries in the communities where mining operations are the chief support of whole populations, they will broaden the base of Federal taxation and add to Government revenues. On the other hand, unless such tax changes are made and the incentive for mining development restored, we must expect decreased Government revenues from the mining industry and from a large segment of our population which depends upon mining and the processing of mineral products.

\* \* \* \*

[1577] In practice, the limitation to not more than 50 percent of the net income reduces the actual depletion allowance for many mines to less than the 15 percent rate on gross income. Over a period of years, the combination of the two rates is likely to reduce the actual allowance to materially less than either of these percentage standards. In the light of experience, both the percentage of gross and the percentage of net should be increased to give a fair allowance for depletion.

As noted earlier, only a few of the mineral properties on which large amounts are spent for development ever become profitable mines. In the great majority of cases the expenditure is a complete loss; in many others only a portion of it is ever recovered. A true base for depletion would be that method which would return to the mining industry as a whole the entire sums expended throughout the years in the search for and development of mineral properties, by both the successful and the unsuccessful ventures; and while in practice the application of such a basis would be extremely difficult, due to inadequate data, it is clear that it would result in a very large increase in present depletion rates.

The importance of adequate depletion allowances as an incentive for venture capital in the mining industry can hardly be overstressed; and it is strongly urged that the modest rates allowed under the present law be raised, by increasing both the present percentage of gross income and the present limitation in reference to net income.

[1579] This is a complex subject, involving various technical features of the present law. In particular the percentage depletion provisions, intended to be simple and easy of application, have been subject to a series of interpretations which tend to create uncertainty and to reduce the allowance that Congress originally intended. Some of these interpretations have become established by Treasury regulations or practice to such an extent that amendment of the law is needed to correct the situation.

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[1579]

#### DEPLETION OF MINES

(A statement by the mining industry)

\* \* \* \* \*

[1582] 5. *The Present need*

Public policy recognizes the importance to our country of a continuous flow of minerals from the mines to the consumers. Minerals are the backbone raw materials for our industrial civilization, indispensable to our welfare and progress in time of peace, vital to our security in time of emergency. The recent war caused vast drains upon our best mineral reserves, and current demands cannot be measured by prewar levels.

Clearly, it is imperative that the search for new and greater mineral reserves be accelerated; that every serious deterrent to this objective be eliminated; that every reasonable incentive toward it be created.

The search for new mines is no longer the simple task of the lone prospector; the easily discovered deposits, for the most part, have already been found.

Applied science and engineering of high order are required in modern prospecting and exploration. The cost of finding and bringing new mines into production has expanded enormously in the last decade. The successful search for, exploration, and development of new mines today depends mainly upon the established mining companies, with trained personnel and ample financial resources and equipment.

Adequate depletion allowances are absolutely essential, if funds are to be available for the continued discovery and development of mineral supplies to replace the reserves being depleted and to increase our mineral supplies to support our expanding population and maintain our rising standard of living.

Percentage-depletion allowances available to producers of many important minerals are wholly insufficient to supply the large volume of funds now required for this purpose. Not only should the principle of percentage depletion be preserved intact, but the allowances should be liberalized to more nearly permit capital recovery and to encourage and stimulate exploration and development activities commensurate with our national mineral requirements.

\* \* \* \* \*

[1608] Statement of JAMES A. WHITE, Secretary, National Minerals Advisory Council, Washington, D. C.:

Mr. WHITE. My name is James A. White. I am secretary of the National Minerals Advisory Council and I am here at the request of Mr. Albright, who is at present on the west coast and is unable to be in Washington today to appear before your committee on be-

half of the Council. He has asked me to present to you his prepared statement setting forth the views of the Council on taxation as it relates to mining and containing recommendations of the Council pertinent thereto.

[1609] (The statement of Mr. Albright follows:)

STATEMENT OF HORACE M. ALBRIGHT, CHAIRMAN, NATIONAL MINERALS ADVISORY COUNCIL

The National Minerals Advisory Council was established and its members appointed by the Secretary of the Interior in December 1947 to advise the Secretary on mining problems and mineral policy. The Council is composed of 46 members and represents a cross section of the domestic mining industry. Serving on the Council are both large and small producers of the various metals and minerals, other than mineral fuels. Members of the Council are chosen in consideration of their experience and knowledge of mining problems and their interest in developing a national minerals policy.

Since its inception the Council has been concerned vitally with the problem of taxation as it relates to mining. The subject of taxation attracted the attention of the Council when it began to inquire into the reasons for the languishment of exploration and development work which has been so apparent in the United States in the past decade.

The Council has on numerous occasions in the recent past expressed its belief that present tax laws deter investment of venture capital in new mining enterprise.

On December 7, 1949, after prolonged study, the Council presented to the Secretary of the Interior several recommendations on tax revision which, if enacted into law, would aid materially in the exploration for and development of new mineral deposits. I appeared before your committee on February 9, 1950, on behalf of the Council in support of those recommendations. Your committee permitted me to insert in the record at that time those recommendations along with an explanatory memorandum and my letter of transmittal to the Secretary of the Interior.

At a meeting on August 3, 1950, the Council again urged most of the original tax revision recommendations.

At its most recent meeting on January 29, 1951, the Council affirmed its confidence in the efficacy of four of the original recommendations designed to stimulate sorely needed exploration and development work in mines. Those four recommendations, with accompanying explanations, are as follows:

\* \* \* \* \*

[1610] (4) Adequate allowances for percentage depletion should be made.

It is with this last recommendation that we are here concerned.

I know the committee desires to confine the scope of the testimony presented today to a discussion of depletion allowance for mines. But I wish to take the opportunity to mention once again the tax-revision recommendations alluded to above because the Council has reiterated those recommendations on two different

occasions since I appeared before this committee last. The Council believes today, as it did a year ago, that the above recommendations, if enacted into law, would provide the incentive needed to increase exploration for and development of new mineral reserves. For that reason I feel it necessary to again bring those recommendations to the attention of this committee and to urge their favorable consideration.

The President inferred in his tax message to the Congress on February 2, 1951, much the same as he did in January 1950, that the depletion allowance granted to certain segments of the mining industry was a tax "loophole" and as such should be discontinued. I do not intend at this time to embark upon an exhaustive discussion of the apparent misconception upon which the President's language is based, but I do wish to point out the necessity for at least safeguarding the percentage-depletion provisions now in our tax laws.

After years of experience with other methods of computing depletion Congress, in 1932, wrote into the law the present percentage method for metal mining, coal, and sulfur. This action showed congressional recognition of the principle that capital should not be taxed as income. The method adopted was a fair and simple means of measuring the value of the miner's wasting asset during the life of his mine. Percentage depletion has subsequently been extended to certain other minerals.

The rates established and the principle behind them have been attacked several times since 1932, but Congress has remained steadfast in its support of them. The attacks on the depletion-allowance provision have

been largely the result of claims of discrimination in our tax laws in favor of mining interests. Such attacks stem from a misunderstanding of the mining process and a tendency to liken mining to manufacturing. Briefly, a manufacturer can replace his [1611] raw materials through open-market purchases while a miner exhausts his raw materials and can only replace them through the expensive process of search for and development of new deposits. The miner is, therefore, committed to the process of continual search for new mineral wealth to replace his depleting capital.

The opponents of percentage depletion appear to be inclined to exaggerate the wealth of the mining industry while observing the taxable income of only a few highly successful operations. To get a true picture we must look at the whole of the mining industry. The great majority of mining enterprises are a financial failure. Approximately nine-tenths of all mining ventures are unsuccessful and the cost of these failures must be included in the cost of the deposits that may be successfully developed. The income of the industry as a whole is the combined net profit and loss of all mining properties.

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[1618] Statement of CHARLES E. GLASSER, President, General Reduction Co., Chicago, Ill.:<sup>a</sup>

MR. GLASSER. I am Charles E. Glasser, president of the General Reduction Co., Chicago, Ill. Our com-

<sup>a</sup> A portion of this statement is included in Gov't App. B, pp. 352-53.

pany mines fuller's earth at Macon, Ga. I respectfully request the adoption of a depletion of 15 percent of gross income for fuller's earth mining operations, or a percentage amount equal to that given many other similar nonmetallic clays and minerals.

\* \* \* \*

[1619] The search for new fuller's earth areas is a risky enterprise, entailing the hazard of large investments of risk capital. Such ventures may be unsuccessful because the deposits are far below the surface of the earth and are nonuniform both as to quality and thicknesses of strata. Geological surveys, aerial mapping, as well as drilling and excavating are costly. Hence, from an investor's standpoint it is vitally necessary that provisions be made which will make adequate allowances for the hazards in mining of fuller's earth and leave an incentive for continued investment of venture capital in other areas. The adoption of 15-percent depletion for fuller's earth would at least provide a minimum incentive for such venture capital.

We understand the Treasury Department has reported before your committee that on the basis of unit costs per ton—a method sometimes used—depletion for nonmetallic minerals mining operations average around 1 cent per ton. On this basis and using the figure of 320,906 tons of fuller's earth mined in 1949 as reported by Bureau of Mines, total depletion would be \$3,209.06 for the entire fuller's earth industry. Gentlemen, I ask you, how much, if any, exploration and initial work could be done even if one company was privileged to spend this entire amount?

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[1621] Statement of FRED O. DAVIS, Vice President and Treasurer, Potash Co. of America, Carlsbad, N. Mex.:<sup>10</sup>

Mr. DAVIS. My name is Fred O. Davis, vice president and treasurer of the Potash Co. of America located at Carlsbad, N. Mex. This statement is submitted in behalf of the Potash Co. of America and other producers of potash in the United States.

\* \* \* \* \*

It has previously been stated that a stable basis of percentage depletion would result in extensive exploratory work with the probability of new discoveries being made. This statement is still true and the situation is of utmost importance because of the restricted area in which potash has been found to occur. The logical character of this reasoning is exemplified by the fact that within the last 3 years two more deposits of commercially exploitable potash have been discovered in the Carlsbad, N. Mex., area and two tremendous operations for refining the product are currently under construction. The experience of these two operators is typical of the precarious nature of the deposits and the enormous investment required to find and develop the mineral.

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[1623] The elimination of percentage depletion for potash or a drastic reduction therein as is recommended by the Treasury Department would hinder and perhaps

<sup>10</sup> A portion of this statement is included in Gov't App. B, p. 406.

prevent the continued exploration for and development of potash deposits which are so vital to the Nation's economy.

[1625] The stability of the industry over the years has been a major factor in its records of constant growth and in the development of additional reserves, and it is a grave question as to whether the costly exploratory work by existing or potential producers could or would have been undertaken if there had been any question concerning the continuance of the present percentage-depletion rate which was granted to the industry after comprehensive study as recently as 1943. There is no question that further operations, in the light of the now necessary tremendous capital investment, will be greatly discouraged if downward changes are made in depletion rates. It is also highly important that rates, once established, should not constantly be subject to change, as any program of development in the mining industry must, of necessity, be long range in character.

[1626] Mr. SIMPSON. Do you believe that if the depletion allowance were cut there would not be sufficient expansion to keep up with our domestic demands in wartime?

Mr. DAVIS. I think there is a very good chance that it would discourage expansion or discourage exploration of the type which has taken place during the last 3 or 4 years and which has resulted in two more companies being ready to enter the field.

[1631] Statements of RUSSELL RAREY, President, Marble Cliff Quarries Co., Columbus, Ohio, and HORACE C. KRAUSE, President, Columbia Quarry Co., St. Louis, Mo.:<sup>11</sup>

[1635] Mr. KRAUSE. My name is Horace C. Krause, president of the Columbia Quarry Co., St. Louis, Mo. I am chairman of the Percentage Depletion Committee for the National Crushed Stone Association and the Agricultural Limestone Institute.

[1635] There are many considerations which make a stone deposit unfit for profitable commercial use, such as lack of economical transportation, lack of ready access to highways, failure to comply with State and Federal requirements for construction, failure to meet chemical and physical requirements of industry and consumers, and structural or geological characteristics which render the stone unfit for commercial recovery. There are other minor but important technical reasons why so few stone deposits are suitable. Most quarries now in use were discovered by trial and error or by accident, and with the present high costs of opening a quarry it cannot be done on a trial-and-error basis.

The industry therefore needs the benefit of percentage depletion to assist in exploration costs. Without percentage depletion, the [1636] industry does not have an adequate profit to satisfactorily prospect for and acquire future stone deposits.

<sup>11</sup> A portion of these statements is included in Gov't App. B. pp. 373-76.

[1640] Statement of RICHARD BUTLER CAROTHERS of the H. C. Spinks Clay Co., Paris, Tenn.:

Mr. CAROTHERS. Mr. Chairman and gentlemen, my name is Richard Butler Carothers. I represent the H. C. Spinks Clay Co., Paris, Tenn.

\* \* \* \* \*

[1645] I wish to dispute one thing that the Secretary of the Treasury has said about depletion. In his statement to this committee, Mr. Snyder says:

The Federal income tax recognizes depletion of wasting mineral assets as a deductible cost in determining net taxable income. The depletion allowance for mineral resources corresponds in principle to the depreciation allowance for plant and equipment.

Now, gentlemen, I am not a lawyer, but I am a clay digger, and I have to buy the equipment to dig this clay with, and I have to pay for it, and I know that percentage depletion is a far different operating matter than depreciation on your plant and equipment. When you buy a truck you have a definite cost on that truck. Under the income-tax law you depreciate that truck over its normal life and you know when you take that money that you have set up there to replace that truck, exactly what you can buy with that money. You know how big a truck you can buy, what size it will be, what tonnage it will haul, and how fast it will run. But when you take your depletion allowance and set it aside, as our companies do, and use that money to look for more deposits and more clay, you do not know the

definite cost of these deposits that you are attempting to get. Many times you spend that depletion allowance during a year's operation and you do not get any deposits.

Sometimes you are lucky and you do very well. But there is an extreme element of risk in the ball-clay industry, and I think you gentlemen certainly see the difference between depreciation and depletion as far as our industry is concerned.

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[1645] The CHAIRMAN. Mr. Simpson.

Mr. SIMPSON. Mr. Carothers, you always contribute something to the committee's thinking when you come before us, and I am always glad to see you here.

The last statement you made is one that should concern the committee quite materially. The fact is that you have, as a result of the depletion allowance, been able to do more exploratory work and I infer that you have been successful.

[1646] Mr. CAROTHERS. We have found some deposits, the various companies have.

Mr. SIMPSON. That the industry might not have found if you had not had the depletion allowance?

Mr. CAROTHERS. I do not believe that some of them would have been financially able to do the work.

Mr. SIMPSON. After all, particularly with respect to any industry connected with the defense of the country, that is the real test, as I see it, of whether we should allow a depletion allowance.

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### Ways and Means Press Releases, 1954

(Committee on Ways and Means, House of Representatives, Press Releases, 1954 (concerning the drafting of the Internal Revenue Code of 1954))

#### Press Release #24, February 18, 1954

Chairman Daniel A. Reed announced that the following substantive changes were agreed to by the Committee on Ways and Means in the Revenue Revision Bill of 1954:

\* \* \* \* \*

2. *Definition of Gross Income from Property.* Under present law and the bill, the percentages referred to in No. 1 above are applied to "gross income from the property." This is defined as gross income from mining, and "mining" in turn is defined as the extraction of the minerals, ordinary treatment processes normally applied to obtain commercially marketable mineral products and certain transportation. Present law also lists a number of specific processes that are considered to be ordinary treatment processes.

The bill contains these definitions except in three respects. In the case of brick and tile clay, crushing, granulating, disintegrating, rolling, tempering and removing air are considered part of "ordinary treatment processes." (However, molding, shaping, extruding, firing or burning are not.) In the case of magnesite, the burning is treated as an ordinary treatment process and in the case of talc fine pulverizing is to be treated as such a process.

The present law is not specific as to what constitutes ordinary treatment processes in the case of brick and tile clay but has been interpreted in the same way as specifically provided by the Committee's bill.

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**Press Release #27, February 24, 1954**

Chairman Daniel A. Reed announced that the following substantive changes were agreed to by the Committee on Ways and Means in the Revenue Revision Bill of 1954:

**I. PERCENTAGE DEPLETION.—**

The Committee reconsidered a previous decision it made with respect to percentage depletion on brick and tile clay. Previously the Committee had agreed to include a specific provision in the bill that ordinary treatment processes with respect to brick and tile clay were not to include "molding, shaping, extruding, firing, or burning," in order to resolve a question which exists under present law. The Committee agreed not to include this specific phrase, thus leaving the treatment of these processes to be determined under existing law.

\* \* \* \* \*

**Internal Revenue Code of 1954**

(INT. REV. CODE OF 1954, §§ 611-13, 68A Stat. 3, 207-08)

**SEC. 611. ALLOWANCE OF DEDUCTION FOR DEPLETION.**

(a) **GENERAL RULE.**—In the case of mines, oil and gas wells, other natural deposits, and timber, there shall be allowed as a deduction in computing taxable income a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under regulations prescribed by the Secretary or his delegate. For purposes of this part, the term “mines” includes deposits of waste or residue, the extraction of ores or minerals from which is treated as mining under section 613 (c). In any case in which it is ascertained as a result of operations or of development work that the recoverable units are greater or less than the prior estimate thereof, then such prior estimate (but not the basis for depletion) shall be revised and the allowance under this section for subsequent taxable years shall be based on such revised estimate.

(b) **SPECIAL RULES.**—

(1) **LEASES.**—In the case of a lease, the deduction under this section shall be equitably apportioned between the lessor and lessee.

(2) **LIFE TENANT AND REMAINDERMAN.**—In the case of property held by one person for life with remainder to another person, the deduction under this sec-

tion shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant.

(3) **PROPERTY HELD IN TRUST.**—In the case of property held in trust, the deduction under this section shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each.

(4) **PROPERTY HELD BY ESTATE.**—In the case of an estate, the deduction under this section shall be apportioned between the estate and the heirs, legatees, and devisees on the basis of the income of the estate allocable to each.

(c) **CROSS REFERENCE.**—

For other rules applicable to depreciation of improvements, see section 167.

## SEC. 612. BASIS FOR COST DEPLETION.

Except as otherwise provided in this subchapter, the basis on which depletion is to be allowed in respect of any property shall be the adjusted basis provided in section 1011 for the purpose of determining the gain upon the sale or other disposition of such property.

## SEC. 613. PERCENTAGE DEPLETION.

(a) **GENERAL RULE.**—In the case of the mines, wells, and other natural deposits listed in subsection (b), the allowance for depletion under section 611 shall be the

percentage, specified in subsection (b), of the gross income from the property excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 percent of the taxpayer's taxable income from the property (computed without allowance for depletion). In no case shall the allowance for depletion under section 611 be less than it would be if computed without reference to this section.

(b) **PERCENTAGE DEPLETION RATES.**—The mines, wells, and other natural deposits, and the percentages, referred to in subsection (a) are as follows:

(1) 27½ percent—oil and gas wells.

(2) 23 percent—

(A) sulfur and uranium; and

(B) if from deposits in the United States—  
anorthosite (to the extent that alumina and aluminum compounds are extracted therefrom), asbestos, bauxite, beryl, celestite, chromite, corundum, fluor-spar, graphite, ilmenite, kyanite, mica, olivine, quartz crystals (radio grade), rutile, block steatite talc, and zircon, and ores of the following metals: antimony, bismuth, cadmium, cobalt, columbium, lead, lithium, manganese, mercury, nickel, platinum and platinum group metals, tantalum, thorium, tin, titanium, tungsten, vanadium, and zinc.

(3) 15 percent—ball clay, bentonite, china clay, sagger clay, metal mines (if paragraph (2)(B) does not apply), rock asphalt, and vermiculite.

(4) 10 percent—asbestos (if paragraph (2)(B) does not apply), brucite, coal, lignite, perlite, sodium chloride, and wollastonite.

(5) 5 percent—

(A) brick and tile clay, gravel, mollusk shells (including clam shells and oyster shells), peat, pumice, sand, scoria, shale, and stone, except stone described in paragraph (6); and

(B) if from brine wells—bromine, calcium chloride, and magnesium chloride.

(6) 15 percent—all other minerals (including, but not limited to, aplite, barite, borax, calcium carbonates, refractory and fire clay, diatomaceous earth, dolomite, feldspar, fullers earth, garnet, gilsonite, granite, limestone, magnesite, magnesium carbonates, marble, phosphate rock, potash, quartzite, slate, soapstone, stone (used or sold for use by the mine owner or operator as dimension stone or ornamental stone), thenardite, tripoli, trona, and (if paragraph (2)(B) does not apply) bauxite, beryl, flake graphite, fluor spar, lapidolite, mica, spodumene, and talc, including pyrophyllite), except that, unless sold on bid in direct competition with a bona fide bid to sell a mineral listed in paragraph (3), the percentage shall be 5 percent for any such other mineral when used, or sold for use, by the mine owner or operator as rip rap, ballast, road material, rubble, concrete aggregates, or for similar purposes. For purposes of this paragraph, the term “all other minerals” does not include—

- (A) soil, sod, dirt, turf, water, or mosses; or
- (B) minerals from sea water, the air, or similar inexhaustible sources.

(c) **DEFINITION OF GROSS INCOME FROM PROPERTY.**—  
For purposes of this section—

(1) **GROSS INCOME FROM THE PROPERTY.**—The term “gross income from the property” means, in the case of a property other than an oil or gas well, the gross income from mining.

(2) **MINING.**—The term “mining” includes not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products, and so much of the transportation of ores or minerals (whether or not by common carrier) from the point of extraction from the ground to the plants or mills in which the ordinary treatment processes are applied thereto as is not in excess of 50 miles unless the Secretary or his delegate finds that the physical and other requirements are such that the ore or mineral must be transported a greater distance to such plants or mills.

(3) **EXTRACTION OF THE ORES OR MINERALS FROM THE GROUND.**—The term “extraction of the ores or minerals from the ground” includes the extraction by mine owners or operators of ores or minerals from the waste or residue of prior mining. The preceding sentence shall not apply to any such extraction of the mineral or ore by a purchaser of such waste or residue or of the rights to extract ores or minerals therefrom.

(4) **ORDINARY TREATMENT PROCESSES.**—The term “ordinary treatment processes” includes the following:

(A) In the case of coal—cleaning, breaking, sizing, dust allaying, treating to prevent freezing, and loading for shipment;

(B) in the case of sulfur recovered by the Frasch process—pumping to vats, cooling, breaking, and loading for shipment;

(C) in the case of iron ore, bauxite, ball and sagger clay, rock asphalt, and minerals which are customarily sold in the form of the crude mineral product—sorting, concentrating, and sintering to bring to shipping grade and form, and loading for shipment;

(D), in the case of lead, zinc, copper, gold, silver, or fluorspar ores, potash, and ores which are not customarily sold in the form of the crude mineral product—crushing, grinding, and beneficiation by concentration (gravity, flotation, amalgamation, electrostatic, or magnetic), cyanidation, leaching, crystallization, precipitation (but not including as an ordinary treatment process electrolytic deposition, roasting, thermal or electric smelting, or refining), or by substantially equivalent processes or combination of processes used in the separation or extraction of the product or products from the ore, including the furnacing of quicksilver ores; and

(E) the pulverization of talc, the burning of magnesite, and the sintering and nodulizing of phosphate rock.

**House Hearings, 1958**

*(Hearings Before the House Committee on Ways and Means on General Revenue Revision, 85th Cong., 2d Sess., pt. 1 (1958))*

[1095] Statement of Hon. ROBERT B. ANDERSON, Secretary of the Treasury

Secretary ANDERSON. \* \* \*

[1097] Last October, the Supreme Court denied a petition for certiorari in a series of cases dealing with the so-called cutoff point for percentage depletion in the manufacture of bricks and cement.

The net result of the cases is to apply the percentage depletion allowance to the price of finished manufactured products, bricks and cement, rather than to the value of the clay and the cement rock before it is manufactured.

In both cases, the effect of the decision is to increase the depletion deductions severalfold over the amounts previously allowed under Treasury regulations. While we support the principle of depletion for these materials, we do not believe that depletion on this scale is reasonable or was intended.

[1098] The problem appears to arise from the application of the phrase "the commercially marketable mineral product or products" in the statute. I recommend the law be revised to prevent these excessive depletion deductions. The revenue loss in the two industries directly covered by the cases is about \$50 million a year.

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**Treasury Proposal, 1958**

(Committee on Ways and Means, House of Representatives, Press Release of April 25, 1958 (concerning the Treasury Department's proposed legislation relating to percentage depletion allowances for the brick and cement industries))

Chairman Wilbur D. Mills (D., Ark.), Committee on Ways and Means, today released a letter from the Treasury Department, along with the Department's proposed draft of legislation, relating to percentage depletion allowances for the brick and cement industries.

Chairman Mills stated:

"I am today releasing a letter and proposed draft of legislation from the Treasury Department relating to percentage depletion allowances for the brick and cement industries. It will be recalled that on January 16, 1958, during Secretary Anderson's appearance before the Committee on Ways and Means wherein he testified on general tax revision, he recommended that legislative changes be made in the allowance of percentage depletion for the brick and cement industries. The attached letter, along with the attached proposed legislation, is designed to carry out the Secretary's recommendation.

"I am releasing this letter and proposed draft of legislation so that they may be available to the interested public.

"It is my expectation that before any action is taken the Committee will hold one day of public hearings on this proposal, at which representatives of the Treasury

Department and the interested public will be permitted to testify. Persons who may be interested in appearing and testifying should submit their requests to the Clerk, Committee on Ways and Means, Room 1102, New House Office Building, as soon as possible. Such persons will be notified of the date for the hearings as soon as it is determined. However, due to the fact that the Committee has a very heavy schedule for the remainder of this session of the Congress and can allow only one day for these hearings, it is very important that interested persons coordinate their testimony and request the appearance of only that number of witnesses who will be able to present such coordinated testimony in one day.

"With this in mind it is suggested that the interested persons consider the advisability of making some arrangement to coordinate their requests to the Clerk so that the Committee will not have the burden of selecting witnesses and allotting time to witnesses since the Committee feels that the interested persons are in a better position to do so. For guidance in such efforts, not to exceed one hour will be allowed representatives of the Treasury Department and not to exceed two hours for the interested public witnesses. This time allocation is for direct testimony of the witnesses. It does not take into account time for questions by Members of the Committee."

The Treasury Department letter and proposed draft of legislation follow.

“TREASURY DEPARTMENT  
Washington

APR 24, 1958

“My dear Mr. Chairman:

“Secretary Anderson, in testimony before your Committee on January 16, 1958, recommended that the law be revised to preclude the allowance of excessive depletion deductions for the brick and cement industries. His recommendation resulted from the Supreme Court's denial of a petition for certiorari in a series of cases involving manufacturers of bricks and cement which held that a taxpayer may compute percentage depletion on the basis of the selling price of the finished manufactured product rather than on the value of the clay or the cement rock before it is manufactured. It is estimated with respect to the two industries directly covered by the cases that excessive depletion allowances will result in a revenue loss of approximately \$50 million a year.

“Courts have consistently found that the statute entitles taxpayers who are extracting minerals to compute their gross income from the property by including the treatment processes which mine operators would normally apply to obtain the first marketable product. The Government has contended that only concentration processes equivalent to those specifically named in the statute for certain minerals are mining processes and hence allowable, whereas manufacturing processes are not allowable. The result of the court decisions is that a taxpayer who extracts the mineral from the ground and applies processes thereto may base his

depletion allowance on income from the commercially marketable product, regardless of whether or not his processes are manufacturing processes. It is believed that depletion on this scale is excessive and was not intended.

"The enclosed proposed legislation would carry out the Secretary's recommendation, with respect to the clay and cement industries, and adopt the prior practice of the Department by delineating between mining and manufacturing processes. The bill specifies the processes allowable in determining a taxpayer's gross income from mining at a cut-off point which with respect to clay products would end with crushing and grinding, and, if the clay were sold in the form of the crude mineral, loading for shipment. The proposed legislation in addition would provide that clay, when used to manufacture building brick and tile products, shall be limited to the depletion rate of 5 percent. Otherwise, clays other than ordinary clay would obtain a distinct competitive advantage when used to manufacture common building products.

"The bill also provides a definition of ordinary treatment processes in the case of calcium carbonates, shale, and other minerals used in integrated operations to manufacture cement. The cut-off point with respect to these minerals is again consistent with prior practice.

"The bill does not affect limestone, calcium carbonates, or shale used for purposes other than making cement.

"The enclosed bill would restore a reasonable allowance of depletion for the cement and clay products industries and, at the same time, provide a statutory

solution for administrative difficulties faced in determining for different taxpayers the stage at which taxpayers first obtain a commercially marketable mineral product.

"In the absence of further legislation providing a specific cut-off point for other minerals and ores, this Department will continue to face substantial problems in determining for many mineral industries the stage at which taxpayers first obtain a commercially marketable mineral product. There is, for example, a question as to whether the stage should be determined by reference to the taxpayer's own local market or the national market. In some cases the local market approach would have the effect of obtaining a different cut-off for the same mineral in different areas of the United States. On the other hand, the national market approach, while establishing a uniform first commercially marketable product for an entire industry, would be difficult to apply in instances where there is no readily available data with respect to the minerals concerned. Moreover, there is a question as to whether the courts would accept the national market approach as the correct construction of the statute.

"As noted, the enclosed bill provides a statutory solution only for the cement and clay products industries. This is the immediate need in view of the recent series of cases dealing with the cut-off point for percentage depletion in the manufacture of bricks and cement.

"The Treasury is prepared to furnish you and the Committee such assistance as you may suggest in resolving further difficulties in this area.

"The Director, Bureau of the Budget, has advised

the Treasury Department that there is no objection to the submission of this proposed legislation.

"Sincerely yours,

(signed) DAN THROOP SMITH,  
*Deputy to the Secretary.*

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"Honorable Wilbur D. Mills  
Chairman, Committee on Ways and Means  
House of Representatives  
Washington 25, D. C.  
Enclosures"

A BILL to specify processes which shall be considered mining for the purpose of computing depletion in the case of clay and in the case of minerals used in making cement.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

SECTION 1. DEPLETION RATE FOR CERTAIN CLAYS AND ALLOWABLE PROCESSES FOR COMPUTING DEPLETION ON CERTAIN MINERALS.

(a) DEPLETION RATE FOR CERTAIN CLAYS.—Subsection (b) of section 613 (relating to percentage depletion rates) is amended as follows:

(A) Paragraph (3) is amended to read as follows:

"(3) 15 percent—

"(A) metal mines (if paragraph (2)(B) does not apply), rock asphalt, and vermiculite; and

"(B) if paragraph (5)(B) does not apply, ball

clay, bentonite, china clay, sagger clay, and clay used, or sold for use, for purposes dependent on its refractory properties."

(B) Paragraph (5) is amended to read as follows:  
 "(5) 5 percent—

"(A) gravel, mollusk shells (including clam shells and oyster shells), peat, pumice, sand, scoria, shale, and stone, except stone described in paragraph (6);

"(B) clay used, or sold for use, in the manufacture of building or paving brick, drainage and roofing tile, sewer pipe, flower pots, and kindred products; and

"(C) if from brine wells—bromine, calcium chloride, and magnesium chloride."

(C) Paragraph (6) is amended by striking "refractory and fire clay,".

(b) CERTAIN ORDINARY TREATMENT PROCESSES—Subsection (c) of section 613 (relating to the definition of gross income from property) is amended as follows:

(A) Subparagraph (C) of paragraph (4) is amended by striking "ball and sagger clay,".

(B) Paragraph (4) is amended (i) by striking the word "and" at the end of subparagraph (D), (ii) by inserting a semicolon in lieu of the period at the end of subparagraph (E), and (iii) by adding at the end thereof the following new subparagraphs:

"(F) In the case of clay—crushing and grinding, and separating the mineral from waste (and, if sold in the form of the crude mineral product,

loading for shipment), but not including as an ordinary treatment process tempering (and other methods of obtaining plasticity), molding or any subsequent process; and

“(G) In the case of calcium carbonates, shale, and other minerals used in making cement—crushing and grinding (including the filtering of slurry in the wet process) prior to burning in the kiln, but not including as an ordinary treatment process burning in the kiln or any subsequent process.”

## SECTION 2. EFFECTIVE DATE.

The amendments made by this Act shall be applicable only with respect to taxable years beginning after December 31, 1957.

**Presidential Budget for 1960—Message from the President of the United States (H. R. Doc. No. 15)**

(105 CONG. REC. 816, 817-18 (1959))

[751] **FEDERAL BUDGET FOR 1960—MESSAGE FROM THE PRESIDENT OF THE UNITED STATES (H. DOC. NO. 15)**

*To the Congress of the United States:*

[753] I urge the Congress to take action now on certain specific changes to maintain or increase revenues and to make the laws more equitable. . . . The Treasury will also recommend an amendment specifying the treatment processes which shall be considered mining

for the purpose of computing percentage depletion in the case of mineral products. This amendment, prompted by court decisions, is designed to prevent an unintended extension of percentage depletion allowances to the sales price of finished products; a similar recommendation with respect to cement and clay products was made to the Congress last year.

\* \* \* \* \*

### Treasury Proposal, 1959

(Committee on Ways and Means, House of Representatives, Press Release of February 12, 1959 (concerning the Treasury Department's proposed draft of legislation specifying the treatment processes which shall be considered mining for the purpose of computing percentage depletion in the case of mineral products.))

**CHAIRMAN WILBUR D. MILLS (D.-ARK.), COMMITTEE ON WAYS AND MEANS, HOUSE OF REPRESENTATIVES, RELEASES TREASURY DEPARTMENT'S PROPOSED DRAFT OF LEGISLATION SPECIFYING THE TREATMENT PROCESSES WHICH SHALL BE CONSIDERED MINING FOR THE PURPOSE OF COMPUTING PERCENTAGE DEPLETION IN THE CASE OF MINERAL PRODUCTS**

Chairman Wilbur D. Mills (D.-Ark.), Committee on Ways and Means, House of Representatives, today released the attached letters from the Secretary of the Treasury to the Speaker of the House of Representatives, dated January 26, 1959, and February 11, 1959, respectively, and the proposed draft of legislation sub-

mitted by the Treasury Department specifying the treatment processes which shall be considered mining for the purpose of computing percentage depletion in the case of mineral products.

It will be recalled that Chairman Mills announced on February 9, 1959, that hearings have been scheduled by the Committee on Ways and Means to receive testimony on this subject, and that the Chairman stated in that press release that the Treasury's draft of proposed legislation would be made available when received.

Chairman Mills emphasized that the testimony during the hearings would be limited to the area covered by the specific recommendations of the Secretary of the Treasury.

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THE SECRETARY OF THE TREASURY  
Washington

JAN 26, 1959.

My dear Mr. Speaker:

In the Budget Message of the President, submitted to Congress on January 19, 1959, the President stated that the Treasury Department would recommend an amendment to the Internal Revenue Code specifying the treatment processes which shall be considered mining for the purpose of computing percentage depletion in the case of mineral products.

Early last year I testified before the Ways and Means Committee on the need to revise the law in order to preclude excessive depletion deductions for the brick and cement industries. My recommendation was made

as a result of a series of court cases which permitted manufacturers of brick and cement to compute percentage depletion on the basis of the selling price of the finished manufactured product rather than on the value of the clay or cement rock before it is manufactured.

It is now apparent under the court decisions that manufacturers of many other products may obtain depletion allowances based on gross income derived from the sale of finished products. This can only result in increasing the depletion deduction for all minerals severalfold—in extreme cases as much as one hundred times. I do not believe that depletion on such an inflated scale is either reasonable or was intended. If permitted, the revenue losses will indeed be serious.

The problem arises because the term "mining" is defined in the statute to include the ordinary treatment processes normally applied to obtain the "commercially marketable mineral product or products" which, in many instances, may be an expensive finished product. Accordingly, in order to prevent excessive depletion allowances, I recommend the immediate elimination of the phrase "commercially marketable mineral product or products" from the statute and the substitution of a new definition of "mining" which will specify the allowable treatment processes for the various minerals.

The proposed legislation would not only prevent a substantial loss in revenue but would also help resolve difficult and complex problems in determining for many mineral industries the stage at which taxpayers first obtain a commercially marketable mineral product.

The Staff of the Treasury is now preparing a draft of the proposed legislation, and in this connection would be pleased to work in cooperation with the Ways and Means Committee staff and the Joint Committee staff in its development.

Sincerely yours,

/s/ ROBERT B. ANDERSON,  
*Secretary of the Treasury.*

Honorable Sam Rayburn,  
Speaker of the House of Representatives,  
Washington 25, D. C.

THE SECRETARY OF THE TREASURY  
Washington

FEB 11, 1959.

My dear Mr. Speaker:

On January 26, 1959, I wrote you concerning the need for an amendment to the Internal Revenue Code specifying the treatment processes which shall be considered mining for the purpose of computing percentage depletion in the case of minerals. The enclosed draft of proposed legislation would implement the recommendations which I made in that letter for minerals.

During the consideration of this legislation by the Congress we shall continue to work cooperatively with the Congressional tax staffs in the development of the legislation, with particular reference to making certain that appropriate treatment is given all affected industries.

It would be appreciated if you would lay the proposed legislation before the House of Representatives. A similar proposal has been submitted to the President of the Senate.

Sincerely yours,

(signed) ROBERT B. ANDERSON,  
*Secretary of the Treasury.*

Honorable Sam Rayburn,  
 Speaker of the House of Representatives,  
 Washington 25, D. C.

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### A BILL

To specify processes which shall be considered mining for the purpose of computing percentage depletion in the case of minerals and ores, and to revise the depletion rates with respect to certain clays when used to make common brick and tile products.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

SECTION 1. DEPLETION RATE FOR CERTAIN CLAYS AND TREATMENT PROCESSES CONSIDERED AS MINING FOR COMPUTING PERCENTAGE DEPLETION IN THE CASE OF MINERALS AND ORES.

(a) Depletion Rate for Certain Clays.—Subsection (b) of section 613 (relating to percentage depletion rates) is amended as follows:

(1) Paragraph (3) is amended to read as follows:

“(3) 15 percent—

“(A) metal mines (if paragraph (2) (B) does not apply), rock asphalt, and vermiculite; and

“(B) if paragraph (5) (B) does not apply, ball clay, bentonite, china clay, sagger clay, and clay used or sold for use for purposes dependent on its refractory properties.”

(2) Paragraph (5) is amended to read as follows:

“(5) 5 percent—

“(A) gravel, mollusk shells (including clam shells and oyster shells), peat, pumice, sand, scoria, shale, and stone, except stone described in paragraph (6);

“(B) clay used, or sold for use, in the manufacture of building or paving brick, drainage and roofing tile, sewer pipe, flower pots, and kindred products; and

“(C) if from brine wells—bromine, calcium chloride, and magnesium chloride.”

(3) Paragraph (6) is amended by striking “refractory and fire clay,”.

(b) Treatment Processes Considered as Mining.—Subsection (c) of section 613 (relating to the definition of gross income from property) is amended as follows:

(1) Paragraph (2) is amended to read as follows:

“(2) Mining.—The term ‘mining’ means the extraction of the ores or minerals from the ground, the treatment processes considered as mining described in para-

graphs (3) and (4), and so much of the transportation of ores or minerals (whether or not by common carrier) from the point of extraction from the ground to the plants or mills in which such treatment processes are applied thereto as is not in excess of 50 miles unless the Secretary or his delegate finds that the physical and other requirements are such that the ore or mineral must be transported to a greater distance to such plant or mills."

(2) Paragraph (3) is redesignated paragraph (5).

(3) Paragraph (4) is deleted and the following paragraphs are inserted in lieu thereof:

"(3) Treatment processes considered as mining.—The following treatment processes where applied by the mine owner or operator with respect to the minerals or ores extracted from the ground by him shall be considered as 'mining':

"(A) In the case of coal—cleaning, breaking, sizing, dust allaying, treating to prevent freezing, and loading for shipment;

"(B) In the case of sulfur recovered by the Frasch process—pumping to vats, cooling, breaking, and loading for shipment;

"(C) In the case of all other minerals or ores—(i) where applied to crude minerals or ores—crushing, grinding, sorting, screening, washing, and drying to remove free moisture; (ii) beneficiation by concentration, and the processes necessary thereto; (iii) beneficiation by cyanidation, leaching, crystallization, or precipitation, and the processes necessary thereto; (iv) any additional process, if necessary, to

bring the mineral or ore to form and condition suitable for shipment; and (v) loading for shipment. For purposes of this subparagraph, the term 'beneficiation by concentration' means the application of processes solely for the purpose of eliminating waste, or separating the mineral or ore from other minerals or ores, by gravity, flotation, amalgamation, electrostatic means, magnetic means, or substantially equivalent processes. The processes referred to in (iv) are those processes which are necessary to bring the mineral or ore to the physical form and condition in which it is capable of being transported as distinguished from those processes applied to make the mineral or ore saleable. The term 'loading for shipment' shall not include the cost of packaging unless otherwise provided for under (iv), nor shall it include the cost of containers, bags, or any similar items;

"(D) The pulverization of talc, the burning of magnesite, the furnacing of quicksilver ores, and the sintering and nodulizing of phosphate rock.

"(4) Treatment processes not considered as mining.—The following treatment processes shall not be considered as 'mining':

"(A) In the case of all minerals or ores—electrolytic deposition, roasting, calcining, thermal or electric smelting, refining, polishing, fine pulverization, blending with other materials, treatment effecting a chemical change, thermal action, and molding or shaping, unless such processes are otherwise provided for in paragraph (3); and

“(B) Notwithstanding any other provisions of this subsection, any treatment process which follows a process that is not considered as ‘mining’ will not be considered as mining for the purpose of this subsection.”

## SEC. 2. EFFECTIVE DATE

The amendment made by this Act shall be applicable only with respect to taxable years beginning after December 31, 1958.

## Part D: Miscellaneous Materials

**Material Submitted to the Treasury Department by the American Mining Congress Concerning Tentative Regulations Defining “Gross Income from the Property” Under the Revenue Act of 1932<sup>1</sup>**

November 23, 1932.

The Honorable James H. Douglas,  
Assistant Secretary of the Treasury,  
Treasury Department,  
Washington, D. C.

My dear Mr. Douglas:

Regulations, Mine Depletion, Revenue  
Act of 1932

Attached are three copies of the Brief prepared by the Executive Tax Committee of the American Mining Congress and signed by its Chairman, Mr. H. B.

<sup>1</sup> In its brief (p. 55 n.2), the Government quotes the memorandum written by Mr. Fernald and dated November 29, 1932. It does not, however, include the rest of the memorandum in its Appendix B. In order to explain in full the American Mining Congress' position, the entire correspondence is set forth here.

Fernald, as the result of the conference which you so kindly granted on November 18th at 2 P.M.

There are some other matters embodied in the tentative regulations which we had hoped to cover but could not do so in the limited time. We may wish to submit further memoranda on some of these other points within the next few days.

Thanking you for your courteous consideration of the problems of the Mining Industry, and trusting that you will at all times feel free to command this office, we remain,

Faithfully yours,

THE AMERICAN MINING CONGRESS,  
By: A. W. DICKINSON.

TREASURY DEPARTMENT  
Bureau of Internal Revenue

In the Matter  
of the

APPLICATION OF PERCENTAGE DEPLETION

MEMORANDUM ON BEHALF OF THE AMERICAN MINING  
CONGRESS

This statement is addressed to the question of the proper interpretation which should be given in the forthcoming Treasury Regulations to the phrase "gross income from the property", as used in Section 114(b) (4) of the Revenue Act of 1932.

The provision for percentage depletion for coal and metal mines and sulphur, first appears in the Rev-

enue Act of 1932. Its essential wording (omitting parts not essential to this discussion) is as follows:

Sec. 114 (b) (4):

"Percentage Depletion for Coal and Metal Mines and Sulphur.—The allowance for depletion shall be, in the case of coal mines, 5 per centum, in the case of metal mines, 15 per centum, and, in the case of sulphur mines or deposits, 23 per centum, of the gross income from the property during the taxable year, excluding from such gross income as [sic] amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, \* \* \*."

In a tentative draft for the Regulations, which we have been permitted to see,—but with the understanding that it is merely a proposal, not carrying any final authority and quite subject to revision and modification,—we find it is proposed in Art. 221 (g) to interpret the phrase "gross income from the property" to mean the market or field price of the crude mineral product at the mine. It is proposed that where there is no such market or field price of crude mineral product, there shall be used in lieu thereof the market price of the product sold minus all costs of converting and transportation. This would give substantially the same interpretation to the phrase "gross income from the property" as had been given to the phrase "gross value at the mine" which was used in the Revenue Act of 1913.

Sections 2 B and 2 C (b) of the 1913 Act provided for depletion of ores and all other natural deposits, "not to exceed 5 per centum of the gross value at the mine of the output for the year for which the computation is made".

This is made clear by Art. 142 of Regulations 33, as follows:

"The term 'gross value at the mine' as used in paragraphs B and C of section 2 of the Act of October 3, 1913, prescribing a limit to the amount which may be deducted in the return of individuals and corporations as depreciation in the case of mines, is held to mean the market value of ore, coal, crude oil, and gas at the mine or well, where such value is established by actual sales at the mine or well; and in case the market value of the product of the mine or well is established at some place other than at the mine or well, or on the basis of the bullion or metallic value of the ore, then the gross value at the mine is held to be the value of the ore, coal, oil, or gas sold, or of the metal produced, less transportation, reduction, and smelting charges."

This is further clarified by T. D. 2137 as follows:

"'Gross value at the mine,' as contemplated in that provision of the Federal income tax law which authorized mining companies to deduct from gross income an amount to take care of depletion of natural deposits, is held to mean the gross price at which the product could be sold at the mine, that is, its actual bona fide market value.

The term 'gross' as applied to 'value' contem-

plates the aggregate value of the product at the mine determined upon the basis of the market conditions at the time and place, and is best defined as the price at which the product sells or would sell when delivered at the mouth of the mine in a marketable condition."

We respectfully submit that the interpretation thus given to the phrase "gross value at the mine" in the 1913 Act is not that which should be given to the expression "gross income from the property" in the 1932 Act, for the following reasons, among others.

# I

## THE LANGUAGE USED IN THE TWO ACTS IS ENTIRELY DIFFERENT:

There is every reason to believe that Congress intended the words "gross income from the property" to convey a meaning different from that of the words "gross value at the mine". We submit that if Congress has intended that the provision of the 1932 Act should in this particular carry the same meaning as the 1913 Act, it would have used the same perfectly clear expression to convey that meaning. Instead, it used a quite different wording, obviously intended to convey a different meaning. So whatever meaning we may ascribe to the expression "gross income from the property" we should not ascribe to it the meaning of "gross value at the mine". It certainly means and was intended to mean something different from this.

## II

THE LEGISLATIVE HISTORY OF THE 1932 ACT MAKES IT CLEAR THAT CONGRESS USED THE PHRASE "GROSS INCOME FROM THE PROPERTY" TO MEAN "GROSS RECEIPTS":

We are not left to conjecture as to this meaning for it is quite clearly set forth in the history of the legislation. The allowance for depletion of mines based on a percentage of the "gross income from the property" is the enactment into law of a proposal presented by the American Mining Congress to the Committee on Ways and Means in 1927.

Subsequent to this proposal, Mr. L. H. Parker, Chief of Staff of the Joint Congressional Committee, submitted to the Committee a "Preliminary Report on Depletion" dated September 27, 1929. There was included in the Parker Report a "Summary Report on Depletion of Metal Mines" by Mr. Alexander B. Shepherd, Mining Engineer for the Joint Committee. An interesting feature of this report is the "Summary of the results of the study of percentage depletion" which shows that the depletion allowances of metal mines for a five year period (1922-1926) under Revenue Acts then in force had amounted to approximately 17.12% of the "gross sales (equivalent to the gross income from the property)".

The provision for percentage depletion as finally enacted in 1932 was extended to coal mines and sulphur as well as metal mines, but the essential provision as to a percentage of the "gross income from the property" is the same.

The inclusion of this provision in the Revenue Act of 1932 resulted from an amendment proposed by Senator Thomas of Idaho, which provided that the allowance for depletion of metal mines should be "15 per cent \* \* \* of the gross income from the property during the taxable year". Regardless of the subsequent changes which were made in this amendment as originally proposed, the expression "gross income from the property" remained unchanged.

When the Thomas amendment was pending before the Senate Finance Committee, Mr. Donald A. Callahan appeared before the Committee in support of that amendment. His statement and accompanying brief appear in the record of "Hearings before The Committee on Finance United States Senate Seventy-second Congress First Session on H. R. 10236" (Revenue Act of 1932), page 224.

Mr. Callahan in his discussion, and the members of the Committee in their questions, made definite references to the above-mentioned "Parker Report". In his argument Mr. Callahan refers (pages 225-226) to the fact that the proposed 15 per cent of gross income was based on the showing in that report, above referred to, that the average of depletion allowed (years 1922 to 1926) had amounted to more than 17% of the *gross receipts*. See for instance on page 226 the following colloquy:

"Mr. Callahan. \* \* \* \* The figures that have been compiled by the Joint Committee on Internal Revenue Taxation, and which are contained in the preliminary report that was presented, covers those

very figures. It covers them not for one year but over a period of years. In which it is shown that the average of depletion allowed amounted to better than 17 per cent.

Senator Reed: On gross?

Mr. Callahan. Yes. Those figures are in this preliminary report which was prepared by Mr. Parker and his staff.

Senator Reed. Have you a copy of that report here, Mr. Parker?

Mr. Parker. Yes.

Senator Reed. The hearings before the Joint Committee?

Mr. Callahan. That is page 67.

Senator Reed. Gives only percentage of net.

Mr. Callahan. This is the gross receipts. That is for the period 1922 to 1926.

The Chairman. Well, that does not cover all classes of mining does it?

Mr. Callahan. They are all broken down. Allowance for lead and zinc ores, 17.21; iron ores, 17.74; for copper 17.21; for gold and silver 16.94; and the weighted average was 17.127."

This report was repeatedly referred to in the discussion and in the brief of Mr. Callahan as presenting the method of depletion which the Thomas amendment proposed, as represented by its provision for 15 per cent of the gross income from the property.

This report is also referred to in the brief submitted

by the National Coal Association, which appears on page 236 of this record of Hearings before the Committee on Finance, urging an allowance of "5 per cent of gross income" for coal. A table presented in that brief (page 241) shows this "5 per cent of gross income" as representing 5 per cent of "Selling price (gross income)". This use of the selling price of the product to represent what the amendment refers to as "gross income from the property" is entirely in harmony with the explanation given in the "Parker Report" regarding the intended meaning of the term "gross income from the property".

A review of this record of Hearings before the Committee on Finance makes it clear that the Committee understood that the proposal for a depletion allowance for metal mines of 15 per cent of the "gross income from the property" which was finally enacted as Section 114(b)(4) of the Revenue Act, was the same proposal as that presented in the Parker Preliminary Report on Depletion thus referred to.

A review of that report shows conclusively that a depletion allowance for metal mines of "15 per centum of the gross income from the property" was and was intended to be a *new* method and not merely the adoption of a changed percentage to the old method which had been prescribed by the 1913 Act.

(a) The Chairman's letter of transmittal of this report to the members of the Joint Committee on Internal Revenue Taxation, dated September 19, 1929, stated in part as follows:

"This preliminary report suggests two new methods for the determination of depletion allow-

ances in the case of mines. It is requested that these methods receive your careful consideration.

Your comments and suggestions on this subject will be appreciated."

(b) The Report itself, which was signed by L. H. Parker, Chief of Staff, states (page 13): \*

"(b) Percentage of gross income method.—The second method proposed for consideration is a form of percentage depletion and was proposed in a brief submitted to the Ways and Means Committee when it was considering the revenue bill of 1928."

It then quotes the proposed change (including that part we have quoted above) and states—

"A report based on similar principles was submitted by Alex R. Shepherd, mining engineer for the joint committee. This report is made a part of the appendix as Exhibit XXXI.

\* \* \* \* \*

The method consists in applying a rate of 15 per cent to the gross income from the property in determining depletion. The percentage is arrived at from the average of the depletion allowed on cost, March 1, 1913, or discovery value."

(c) The Shepherd report appears on pages 63 to 74. It presents on page 65 a table entitled:

"Table I.—Summary of the metal industries for a 5-year period (1922-1926) showing the gross sales

\* All page references to the Parker Report are to the 1930 print.

(equivalent to the gross income from the property), and the depletion allowed (on the basis of cost, March 1, 1913, and discovery valuations) for the different metals. This tabulation represents approximately 75 per cent of the total American-owned production."

The table then sets forth for different classes of ores—in the first column, "gross receipts on basis of net smelter returns or equivalent"; in the second column, "Depletion allowed"; and in the third column, "Depletion to net smelter returns or equivalent", giving an average of 17.127 per cent.

It states (page 66) (*Italics ours*)—

"Table 1 shows that the metal-mining industry has received in depletion allowances an average deduction equivalent to about 17 per cent of the *gross value*.

From the study of this subject it is believed that *15 per cent of gross sales value* with a 50 per cent limitation to net income, would be a reasonable rate to allow the metal-mining industry for the future. This reduction by 2 per cent of the actual figures shown in the summary is thought advisable to offset the continuing effect of the percentage depletion method.

The *15 per cent depletion allowance on gross sales* is equivalent to a theoretical deduction of 30 per cent on net income. In actual operations the 30 per cent on net may vary 15 per cent above or below this figure, depending on the profits made by the particular operation.

Statistics of the Internal Revenue Department covering all metal mining for the year 1925 show *depletion allowances to gross sales of 16.7 and 33 per cent to net income*. From these figures and others in individual cases, it is thought probable that over a period of years (good and bad in the business sense), the greater part of the revenue to the Treasury Department will be derived from the operations showing profits above this *15 per cent average to gross sales*. Those falling below automatically are limited to 50 per cent of the net income.

The percentage plan fixes a limit to depletion allowances at both ends of the line. Taxpayers whose profits are small are justly treated by the 50 per cent limitation to net income. Taxpayers whose profits are large are limited to *15 per cent of their gross sales* which in many cases is less than the amount that they have gotten in the past. Further, the percentage basis follows the *sales price* which is just and the taxpayers will receive a more equitable depletion distribution of their wasting assets from year to year and in proportion to their income."

It states (page 68)—

"It will be necessary to define what is meant by gross income from the property and to definitely indicate the point in accounting at which it is to be determined as well as other details. This can be done, either in the act, or interpreted in the regulations.

The consensus of opinion seems to be that the act should be written as simply as possible (as in the case of oil and gas) and the necessary definitions should be written into the regulations."

It then gives the suggestion for the wording to be used in the Act, including provision—

"(2) In the case of metal mines the allowance for depletion shall be 15 per cent of gross income from the property during the taxable year, such allowance shall not exceed 50 per cent of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance be less than it would be if computed without reference to this paragraph."

(d) Tabulations then follow which give examples of this computation, as follows:

Lead—Based on market price of lead per pound.

Zinc Concentrates—Based on gross sales price per pound at mill.

Iron Ore—Based on gross sales price f.o.b. cars at mine.

Copper—Based on market price per pound of Copper.

Clearly, then, the Shepherd Report did not contemplate that the expression "gross income from the property" would carry the same meaning as that which had been given to the expression of the 1913 Act—"gross value at the mine". The proposal which he presents

is for including in the law an allowance for "15 per cent of gross income from the property" with the 15% derived from "gross sales".

The question now before the Commissioner in drafting his regulations is not one of whether Congress acted wisely when it included in Section 114 (b) (4) this provision for percentage depletion based on "gross income from the property", nor is the question now before him one as to whether the expression used was the best which might have been used to express the intent of Congress. The Commissioner is solely concerned with having his regulations express and be in harmony with what Congress intended.

We understand that there is some thought within the Bureau that because in the case of oil and gas wells, Art. 221 (i) of Treasury Regulations 74 (and similar provisions of prior regulations) provided "gross income shall be assumed to be equivalent to the market or field price of the oil and gas before conversion or transportation", i.e., price at the mouth of the well, this expression when used as applicable to mines should be similarly interpreted to mean the value of the ore at the mouth of the mine. The Joint Committee's report evidences that this was not the intention, but it was rather intended to use the market price applicable to the product in the form in which it was customarily sold.

For oil there is a generally recognized price at the mouth of the well; for iron ore there is a price for the ore f.o.b. cars, and it was intended to use such prices for these products. In the case of metals, such as copper and lead, which are ordinarily sold in refined form, it was intended to use such metal prices and not to figure

back to get an assumed value of the ore at the mouth of the mine. In each case the ordinary trade practice was the governing factor. It was for this reason that the smaller 15% was used in the case of metal mines, while 27½% remains in the case of oil and gas. Therefore, the smaller percentage used in the case of metals is ample justification, if any were needed, for the Bureau's following in its regulations the clear legislative intent as shown by the hearings before the Senate Finance Committee, and in using, in the case of metal mines, as a basis, the actual sales receipts for the metals. This gives the desired simplicity in the computations which is not obtained by using some arbitrary cut-off point not in accord with the customary trade practice.

These differences as to the various metals or mineral products were all taken into account in determining the percentage which should be applied. The 17% shown by the Joint Committee's report and referred to in the Finance Committee Hearings, was not based on using the value at the mouth of the mine for all ores. Had this been done a much higher percentage would have resulted for lead, copper, gold and silver, so we would not have had the average for all of these of approximately 17%, which was the basis for the 15% figure adopted in the law. For these metals, "gross income from the property" is taken as representing customary sales in refined metal form and on this basis the figure of approximately 17% resulted. To ignore this fact would be a gross discrimination against the miners of such metals and would not accord with the intent of Congress in adopting a uniform percentage based on their respective trade practices.

Question is raised as to the particular reason for using the words "from the property". Reference was made to the particular property because it was recognized that any taxpayer might own various properties in different locations and quite different in their character and results. It was intended that in such case each property should stand on its own basis and, subject to the limitations applicable to it, the 15% of gross is not to be computed on the aggregate sales from all properties combined, nor is the 50% of net to apply to the total net income from different properties. The computations are to be separately made for each of the different properties. If the 50% of the net income would be more than the 15% of gross from one property, that excess may not be applied to make up a deficiency as to another property. Moreover, the election, to the extent permitted, is to be made as to each separate property so that a taxpayer may adopt percentage depletion as to one property but may use cost or March 1, 1913 basis for another.

We therefore respectfully urge that the forthcoming Treasury Regulations give such definition of the phrase "gross income from the property" as will accord with the real intent of this provision of the law.

AMERICAN MINING CONGRESS,

(Signed) H. B. FERNALD,  
Chairman, Tax Committee.

November 22, 1932.

THE AMERICAN MINING CONGRESS  
Washington, D. C.

November 30, 1932.

The Honorable James H. Douglas,  
Assistant Secretary of the Treasury,  
Washington, D. C.

Regulations, Mine Depletion, Revenue Act of 1932

Dear Sir:

To supplement our Brief of November 23, 1932 as to the application of Percentage Depletion, particularly to answer definite questions which you asked of us, at the hearing on November 18th, we submit herewith a memorandum giving our suggestions as to the wording which we believe might appropriately be used in the forthcoming regulations to define the phrase "gross income from the property".

We also submit for your attention an extract from Col. Robert H. Montgomery's book, just published, in which he discusses the appropriate meaning of this phrase, and arrives at the same conclusions as we have been urging upon you.

Respectfully,

THE AMERICAN MINING CONGRESS.  
By (Sgd) A. W. DICKINSON.

MEMORANDUM AS TO THE DEFINITION OF THE PHRASE  
 "GROSS INCOME FROM THE PROPERTY"

AS USED IN SECTION 114 (b) (4) OF THE REVENUE  
 ACT OF 1932

The memorandum of the American Mining Congress of November 22, 1932, sets forth the essential intent that "gross income from the property" meant "gross sales" and did not mean "value of the ore at the mine".

That memorandum brings out that the 15 per cent was adopted as a round figure somewhat less than the average percentages of prior depletion allowances to the gross sales and that these averages had been determined by taking for various divisions of the industry the bases on which the sales were ordinarily and customarily made in each separate division. For example, copper, lead, gold and silver were computed on refined metal prices, whereas iron ore, coal, etc. were computed on the basis of the usual sales price of the ore or coal.

Granting, as we believe it must be granted, that the law intended that the specified percentage should be applied to "gross sales", question is raised as to the appropriate wording of the regulations to express this intent. There are two possible bases, either of which would meet the test of a percentage based on "gross sales", viz.—

(a) Each taxpayer should make its computation of 15 per cent on its own actual sales of its products (whether ore, concentrates, refined metals, etc., depending on the form in which it actually made sale of its production) or

(b) For each division of the industry the 15 per

cent should be computed on the price of the product which was ordinarily and customarily the subject of sale by that particular division of the industry.

The effect of these two bases may be illustrated as follows:

(a) On the basis of actual receipts of each taxpayer, one copper mining company, for example, would figure the 15 per cent on refined metal price if it sold its product as refined metals, whereas another company would have to figure the percentage on its concentrate price if its product was sold in the form of concentrates.

(b) On the basis of the form in which the product was ordinarily and customarily sold, each copper mining company would figure the 15 per cent on the refined metal price regardless of whether it sold its product as concentrates or as refined metal, whereas an iron ore company would take its price for the ore f.o.b. cars and would not be permitted to figure the 15 per cent on the iron or steel produced from such ore.

Some justification may be urged for either of these bases. As to (a), the statement presented to the Finance Committee by Mr. Callahan was that the 15 per cent would apply to "gross receipts" or "gross sales". The Parker report refers to the proposal as one for "15 per cent depletion allowance on gross sales". These and other references could be cited to indicate the intention that the 15 per cent should be applied to the actual gross sales of each taxpayer.

On the other hand, the 15 per cent figure was derived from computations based on the ordinary and customary form in which the product was sold in the sev-

eral divisions of the mining industry. For copper, lead, silver and gold this basis was the refined metal, to accord with the customary method of selling the product.

In this connection we would note that, for nonferrous metals generally, the product is customarily sold on the basis of the market value of its net recoverable metals. This is true regardless of whether the product is sold in the form of ore, concentrates or blister. For example, where the mining company's product is shipped to a smelter, the smelter liquidation ordinarily makes its computation somewhat as follows:

1. It starts with the total metallic contents shown by assay of the product received at the smelter.

2. It then shows the deductions to be made for metals not to be paid for (representing smelter losses, etc.) with a resulting balance of the metals to be paid for.

3. Computation is then made of the market value of such metals and the resulting amount to be paid for the metallic contents of the ore.

4. On the other side computation is made of the charges for smelting such ore according to the contract or other basis agreed to; and any disbursements for transportation or other charges.

5. The result is then the net amount payable for the product received by the Smelter.

From this it will be seen that in any such case what is really sold and paid for is the recoverable metals in refined form taken at current market prices. Against this gross sales price the deductions for treatment charges, etc. are then made to get the net amount payable.

There are other cases in which the smelter does not purchase the metals but makes a charge for its smelting which is paid by the mining company, and then returns to the mining company the metals in kind, which metals the mining company itself or through an agent will later sell.

This matter of detailed procedure is merely mentioned to indicate that even though the mineral product is shipped from the mine in the form of ore or concentrates, it is really the recoverable metal content which is the subject of the sale and which is to be paid for. This is the recognized basis in the industry which was adopted in computing the depletion percentage for such metals.

If we adopt basis (a) and hold that the 15 per cent should be applied to the gross sales of each particular taxpayer according to the form in which that taxpayer may dispose of its product, the proposed regulation might be made to read somewhat as follows:

#### PROPOSAL A:

"For the purpose of this subdivision 'the gross income from the property' shall be the competitive market receipts, or their equivalent, received from the sale of the crude, partially beneficiated, or refined metal, the product actually disposed of by the taxpayer to govern the method of computation of receipts in all cases."

Such a regulation would comply with the essential requirement that the percentage should be computed on gross sales. It would give the simplest possible manner

of making the computation. It is, however, subject to the possible objection that it might not give the same depletion basis to all the taxpayers in any particular division of the industry, but one might receive more and another less according to the particular way in which it happened to dispose of its product. Also it may be urged that such a regulation would not be in accord with the regulations as to oil which require the use of the basis on which oil production is ordinarily sold in that industry, regardless of how a particular taxpayer may dispose of its own product.

We may then suggest that basis (b) be adopted, somewhat as follows:

#### PROPOSAL B:

“ ‘Gross income from the property’ as used in Section 114 (b) (3) and (4) and Articles 221 to 248, inclusive, means the gross sales of the mineral product of the property in the form in which it is ordinarily and customarily sold by the owners or operators of oil or gas wells or by the owners or operators of the particular branch of the mining industry. For oil and gas, the actual sales price of the crude mineral product shall be used, or if the crude mineral product is not sold at the mine or well, then there shall be used the recognized or usual market or field prices (as of the date of sale by the taxpayer of the product which is sold) of crude mineral product of like kind at the mine or well. For coal, the price to be used shall be the actual or recognized price for sale of coal on cars

ready for shipment to purchasers. For iron ore and other metalliferous ores which are customarily sold f.o.b. cars at mine, such price shall be used. For lead, copper, gold, silver, and other metals which are customarily sold in refined form, the usual refined metal prices f.o.b. refinery shall be used."

This proposal it will be noted conforms to the basis used in the Parker report in computing the percentages. It uses a basis of gross sales or gross receipts, but for any taxpayer adopts the standard which is customarily used in his particular branch of the industry.

One reason for using the basis which is customary in the trade or business is that it would be more in harmony with what has already been prescribed for oil. The regulations have for some years prescribed for all oil and gas companies the basis of sales at the well, which is the customary basis ordinarily used in the industry. Such basis is adopted by the regulations as applicable to all such producers of oil regardless of whether or not that is the particular manner in which their sales are made. Proposal B would adopt for mines a similar basis and require that the ordinary and usual selling basis customarily applicable in each division would be used as applicable to all producers of that division, regardless of the particular form in which any producer sold its own product.

We believe either of these proposals would meet the essential intent of the law, but that Proposal B would also be in harmony with the prior provisions of the regulations regarding oil and gas.

These proposals are accordingly submitted for consideration by the Treasury Department.

THE AMERICAN MINING CONGRESS,

(Signed) H. B. FERNALD,

*Chairman, Tax Committee.*

November 29, 1932.

WHAT CONSTITUTES "GROSS INCOME"

(Extract from pages 458-460 "Federal Tax Handbook  
—Revenue Act of 1932"—Dated October 31, 1932 by  
Robert H. Montgomery)

It follows that the point at which the value of the production of the mine (or oil or gas well) shall be taken is of importance. For example, shall the income of an anthracite mine be the selling value of the coal after it comes from the breaker in which it is prepared for market, or shall an attempt be made to value the coal after it comes out of the shaft and before it goes into the breaker and such estimated value be deemed to be the gross income from the mine? It is seldom, if ever, that the output of an anthracite mine is sold before it has gone through the breaker. In other words, the breaker operation is, broadly speaking, a part of the mining of the coal, the work done up to the time the coal emerges from the shaft being the underground part of the operation, and the work thereafter—of which the breaker operation is the principal portion—being the above-ground part of the total mining operation. Both underground and above-ground operations are essential to the extraction of a marketable product from the mine.

Again, in the case of a copper mine, the production of the crude or raw ore is merely a first step in obtaining copper—the product for which the mining operation is carried on—from the mine. Possibly the ore may sometimes be sold and the smelting and refining of it be done by or for the purchaser, but, if so, it is the exception and not the rule. The smelting and refining operations are most often carried on by or for the miner of the ore. These operations are essentially for the purpose of removing the impurities which are intermingled with the copper, and not to produce something other than the only thing which gives value to the mine—its copper content. The purpose or result of the smelting and refining operations is not to put the copper into fabricated form.

Hence, it may well be claimed that the gross income of the mine should be based on the sales value of what would normally be considered to be the product of the mine, whether prepared coal, refined copper, or other mineral. The question has many angles and will require careful consideration in each case in which percentage depletion is claimed. It may not be feasible to lay down a general rule which will apply without exception or modification to all classes of mines, as well as to oil and gas wells.

Depletion has always been determined in the past on the basis of values of metal mines based upon the price at which the metallic contents (concentrated, smelted and refined) were sold in the market.

The basis on which Congress fixed the rate of 15 per cent as applied to metal mines was based upon statistics furnished to it by the engineers of the Treasury Depart-

ment, showing the average rate of depletion allowed metal mines, computed on valuations made in this way. Unquestionably, Congress in fixing the rate of percentage depletion relied upon these statistics and intended that the metal mines should have an allowance which more or less approximated the old amounts computed on the values of the mine, arrived at by reference to the sale of the finished product.

Mines, particularly copper mines, are not bought, sold, or valued in the market except by reference to the price of the finished product. The price of the finished product is always looked upon as the gross income, and the determination of this gross annual income is the first step in valuing such properties. This has been the universal practice among engineers and investors in mines.

Valuation of mines for state tax purposes (where there is not a special statute defining some arbitrary method or establishing some different formula) are regularly made by reference to price of the finished product, and the local state courts have repeatedly sustained this method.

Valuations of mines for estate tax purposes and before the courts and Board of Tax Appeals, where the value has become material for other purposes than depletion, are regularly valued by reference to the price of the finished product.

There are no satisfactory and reliable statistics published or issued by the metal mining industry, particularly the copper industry, giving or furnishing the price of the ore at the collar of the shaft. There is no source from which such statistics could be obtained or as-

sembled because there is generally no regular market. Therefore, the gross income from the property from ore at the collar of the shaft can only be *computed* by a series of calculations or deductions starting from the price of the finished product and deducting from it the cost of beneficiation (refinement, smelting, concentrating, operating, etc.) plus a reasonable profit on the investment in such operations. This would lead to all sorts of troublesome and difficult questions of accounting and to the indeterminable question of deciding what is a fair profit in each one of these operations.

Undoubtedly, Congress's intention in passing percentage depletion was to simplify and not render more complex the computation of depletion.

Hence, it may well be claimed that the gross income of the mine should be based on the sales value of what would normally be considered to be the product of the mine, whether prepared coal, refined copper, or other mineral. The question has many angles and will require careful consideration in each case in which percentage depletion is claimed. It may not be feasible to lay down a general rule which will apply without exception or modification to all classes of mines, as well as to oil and gas wells.

December 7, 1932.

The Honorable James H. Douglas,  
Assistant Secretary of the Treasury,  
Washington, D. C.

My dear Mr. Douglas:

In the memorandum as to the definition of the phrase "gross income from the property", dated November 29th, 1932 and filed November 30th by our Tax Committee, we submitted two proposals relative to Article 221, paragraph (g) of the proposed regulations for the Revenue Act of 1932.

In proposal "A" we omitted the word "minerals" which would cover percentage depletion as shown in the Revenue Act of 1932 for coal, oil, gas and sulphur. We therefore request that "A" be amended to read as follows:

"PROPOSAL A: For the purpose of this subdivision 'the gross income from the property' shall be the competitive market receipts, or their equivalent, received from the sale of the crude, partially beneficiated, or refined metal or *minerals*: the product actually disposed of by the taxpayer to govern the method of computation of receipts in all cases."

In proposal "B" we also omitted specific reference to sulphur which is allowed percentage depletion under the Revenue Act of 1932, and we therefore ask to have this proposal read as follows:

"PROPOSAL B: 'Gross income from the property' as used in Section 114 (b) (3) and (4) and

articles 221 to 248, inclusive, means the gross sales of the mineral product of the property in the form in which it is ordinarily and customarily sold by the owners or operators of the particular branch of the mining industry. For oil and gas, the actual sales price of the crude mineral product shall be used, or if the crude mineral product is not sold at the well, then there shall be used the recognized or usual market or field prices (as of the date of sale by the taxpayer of the product which is sold) of crude mineral product of like kind at the well. For *sulphur and coal*, the price to be used shall be the actual or recognized price for sale of *sulphur or coal* on cars ready for shipment to purchasers. . . . For iron ore and other metalliferous ores which are customarily sold f.o.b. cars at mine, such price shall be used. For lead, copper, gold, silver and other metals which are customarily sold in refined form, the usual refined metal prices f.o.b. refinery shall be used."

In considering our memorandum on this subject, we respectfully request that these proposals be used as above corrected.

Faithfully yours,

A. W. DICKINSON.

**Internal Revenue Service, Revenue Ruling 54-109**

(1954-1 CUM. BULL. 62)

**SECTION 23(m).—DEDUCTIONS FROM GROSS  
INCOME: DEPLETION**

Rev. Rul. 54-109

**REGULATION 118, SECTION 39.23(m)-1:** Depletion of mines, oil and gas wells, other natural deposits, and timber; depreciation of improvements.

(Also Section 114, Section 39.114-1.)

Determination of the processes properly included in the term "ordinary treatment processes" as set forth in section 39.23(m)-1(f)(3) of Regulations 118, and section 114(b)(4)(B) of the Internal Revenue Code, with respect to the manufacture of brick and tile from shale and brick and tile clay.

Advice has been requested as to the processes in the manufacture of brick and tile and kindred products from shale and brick and tile clay that are included under the term "ordinary treatment processes" as used in section 39.23(m)-1(f) of Regulations 118, and section 114(b)(4)(B) of the Internal Revenue Code.

The various treatment processes involved in the manufacture of such products are as follows:

(1) The mineral is first extracted from the earth, usually from open pits.

(2) It is transported to the plant, generally by dumpcars or trucks.

(3) The mineral is there dumped into bins or

sheds for storage or directly into a crusher or granulator where the large chunks are reduced to small workable sizes.

(4) In some cases, secondary grinding is required.

(5) The mineral is then conveyed to a pugmill where it is mixed to the proper consistency usually with the addition of water and/or other materials.

(6) The mixed product is then formed into the shape desired, usually by an extrusion or molding machine.

(7) These raw forms are then processed for the removal of excessive moisture and are then burned in kilns.

(8) Finally, the finished products are drawn from the kiln and loaded for shipment or storage.

Based on these facts, the first four processes are "ordinary treatment processes" within the meaning of section 114(b)(4)(B) of the Code, and section 39.23(m)-1(f) of Regulations 118. The mixing of the mineral in the pugmill with water where this is done to separate out sand or other materials from the clay or shale is also considered to be an "ordinary treatment process"; other actions in the pugmill, as well as the succeeding processes listed above, are not considered to be "ordinary treatment processes."

As to the computation of the gross and net income from the property for percentage depletion purposes after the cost of mining and manufacturing have been segregated, see sections 29.23(m)-1 (f) and (g) of Regulations 111, and sections 39.23(m)-1 (e) and (g) of Regulations 118.

Letter of June 4, 1955, from Senator Walter F. George to  
T. Coleman Andrews, Commissioner of Internal Revenue<sup>2</sup>

June 4, 1955.

Honorable T. Coleman Andrews, Commissioner,  
Internal Revenue Service,  
Washington, D. C.

DEAR COMMISSIONER ANDREWS:

It was very considerate of you to meet the representatives of the Cherokee Brick and Tile Company and parties interested in the regulation for computing depletion allowance for federal income<sup>2</sup> and excess profits tax purposes on brick clay.

I had, of course, expected to be present at the conference and desired to do so, but an unforeseen situation arose in the Foreign Relations Committee which made it absolutely necessary for me to remain with the Committee during the hours of your conference in my office. I have learned through my Secretary, Mr. John Carlton, that you with some of your assistants appeared and that you went into the matter at some length.

You will recall that, at the first or primary meeting with the Joint Committee on Internal Revenue Taxation, I stated my position and my position is precisely the same as it was at that time, namely, the statute defining mining for purposes of computing depletion allowance for federal income and excess profits tax pur-

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<sup>2</sup> This letter is referred to and quoted in the House Hearings, 1959, pp. 258, 264 and was reproduced in full, with Senator George's approval in the Brick and Clay Record, Vol. 130, No. 1 (January, 1957), pp. 87-88.

poses does not exclude manufacturing processes so long as they are ordinary processes normally and necessarily used in obtaining commercially marketable mineral products.

I personally recall the discussion in executive session between members of the Senate Finance Committee when this statute was under consideration. At the time it was not only understood but I pointed out what I knew and believed to be the facts about brick manufacture. I stated that often lands, containing brick clay deposits, could be bought at a cheap price but generally the recovery of the clay from the areas where it existed in Georgia, at least, was a costly operation. I specifically said to the members of the Committee, who were present, that clay had no commercial marketable value, as a general rule, until after the clay was given the ordinary treatment processes. In the meeting with the Joint Committee on Internal Revenue Taxation, my recollection is that the position taken by the Commissioner was that clay would have some commercially marketable value before baking or cooking. But one instance, however, was pointed out and it was clearly an exception to the general rule. Brick clay at this time has no commercial value until it is baked or cooked. The Senate Finance Committee certainly understood this clearly before the Act, giving depletion allowance to brick clay, was passed.

There is nothing ambiguous about the language "commercially, marketable, mineral product". It is plain and certain. Today raw clay has no commercial value for brick and tile manufacture except in some isolated cases where the clay is desired for other pur-

poses. Clay cannot be reasonably regarded as an ore and it does not fall within the exceptions to the general rule, stated above, and recognized in the Cherokee Brick and Tile Company Case against the United States, U.S. District Court for the Middle District of Georgia.

The intent of Congress in this matter is too clear to admit of argument.

If it is the view of the Commissioner that the Congress went too far in stating the rule for computing depletion allowance for federal income and excess profits tax purposes, as interpreted by the courts, then I most respectfully suggest that the Commissioner or the Secretary of the Treasury should come before the proper Committee of the Congress and urge an amendment to the law itself. The expense of burdensome litigation ought not to be thrown upon the taxpayers in this instance, taxpayers who as a general rule are unable to protect their rights through expensive litigation in the courts.

Sincerely yours,

WALTER F. GEORGE.

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**Internal Revenue Service, Technical Information Release  
No. 62, October 18, 1957**

(1957 INT. REV. BULL. No. 43, at 51; 5 CCH 1957 STAND. FED. TAX REP. ¶ 6824; 4 P-H 1957 FED. TAX SERV. ¶ 76,726.)

The Internal Revenue Service announced that in view of the denial by the Supreme Court of the United States on October 14, 1957, of the Government's peti-

tions for certiorari in *United States v. Merry Brothers Brick & Tile Co., et al.*, 242 Fed. (2d) 708 (1957), and in *Dragon Cement Co., Inc. v. United States*, 244 Fed. (2d) 513 (1957), it is taking steps to dispose of pending litigation and claims involving brick and tile clay and cement rock, as required under these decisions, and to conform Treasury regulations and outstanding rulings accordingly. This should permit the expeditious disposition of the great majority of such cases. Consideration is being given as to the applicability of these decisions in cases involving fire clay and limestone.

**Taggart, Handbook of Mineral Dressing (1945 ed.)**

[2-70]

**19. GOLD AND SILVER**

**Gold**

\* \* \* \* \*

[2-71]

**TREATMENT**

\* \* \* \* \*

[2-73] Separation methods applicable to gold and gold-silver ores are amalgamation (Sec. 14, Arts. 5 to 8); gravity concentration, particularly sluicing, straking, fine jigging, and tabling (Sec. 11); flotation (Sec. 12, Art. 49), cyanidation, and smelting. Silver, when it occurs [2-74] other than as a minor associate of gold, is usually so closely associated with copper or lead minerals that it remains locked with them in ordinary grinding, or goes with them, even if freed, when subjected to ordinary methods of concentration, so that separation is deferred to smelting treatment.

The primary desideratum in precious-metal separations is recovery in metallic form at the mill, since this both reduces freight and separation costs (by eliminating shipment to a smelter and smelter charges), and, by making cash returns quickly available, decreases the amount of working capital necessary. Amalgamation and cyanidation both yield bullion at the mill. Hence one or both of these methods is normally practiced, if the ore is amenable. Nonamenability may flow from minuteness of size of the precious-metal particles, or from association with minerals which interfere with the working of the processes. In either case concentration is utilized as a means of reducing bulk to an extent that makes more intense treatment by amalgamation or cyanidation economically possible, or to get the values into the best shape for final separation by smelting. Costs of ultimate separation increase from simple amalgamation to flotation with smelting of concentrate; the following list comprises an arrangement of treatment methods and combinations thereof in general order of increasing total charges against the gold, which embraces most flow sheets.

—1. **Amalgamation only.** Applicable to clean primary ores, and to fully oxidized surface ores of gold in which the gold particles are not too fine to settle in a shallow flowing stream of water, and are not rusty. Plants using amalgamation only are those which serve small mines, usually in the prospecting stage, extracting high-grade ore. Typical examples are reported from northeastern Oregon (*IC 7015*).

At the GLEASON MINE a highly oxidized quartz ore is fed directly into a battery of 5 or 650-lb. stamps.

crushed through a 45-m. screen, and passed over an amalgamating plate sending tailing to waste. A recovery of 90% from \$40 ore is reported. The power plant consists of a 12-hp. steam engine and a 14-hp. wood-burning boiler. See also Fig. 78.

**2. Gravity concentration + amalgamation.** Applicable to ores in which gold is relatively coarse, but either coated, or associated with sulphides not harmful to amalgamation, or ores in which the amount of gold is very small (placers). In any case the initial recovery is made by concentration, and concentrate is amalgamated, either in the concentrator (*e.g.*, mercury in sluice riffles), or in a barrel or the like, with more or less regrinding, if necessary to render the particles amenable to mercury wetting and collection.

This is the typical treatment scheme for placers (Art. 20), for small mills to treat high-grade lode ores in the development stage, and, at a few plants, for the final mill for such ores. For many years it was the only type of mill used for ores such as those on the Mother Lode in California (see IC 6476, ARGONAUT MILL). For recent Mother Lode practices see IDAHO-MARYLAND (Fig. 64) and also p. 99.

At MONT TSI, Belgian Congo, ore is ground in a Chilean-mill with mercury, passes through an amalgam trap, thence over blanket tables, is thickened, ground in a ball mill-classifier circuit with Hg, passes through an amalgam trap, and thence over blankets which make final tailing. All concentrates are barrel-amalgamated.

**3. Amalgamation + gravity concentration + cyanidation.** Applicable to clean ores containing gold of a

wide range of sizes, a part too fine for amalgamation and a part too coarse for rapid solution by cyanide.

**4. Cyanidation only.** Applicable to clean ores with gold finely dispersed, sulphide content relatively low, and at least an appreciable part of the gold in the non-sulphide mineral. See *Rose and Newman; Dorr*.

**5. Cyanidation  $\pm$  concentration + cyanidation of concentrate.** Used with clean ores containing a relatively small amount of pyrite in which the gold is extremely fine. The ore is usually ground in cyanide solution, a sand-slime separation made, pyrite floated from the sand, concentrate reground (usually in cyanide) to expose the gold, and the reground material further cyanided separately or mixed back with the original slime.

**6. Flotation ( $\pm$  gravity concentration and/or amalgamation) + cyanidation of concentrate.** For clean ores with relatively high pyrite content, low content of valuable base metals (Pb, Zn, Cu), and gold largely associated with the sulphides. If coarse gold is present, amalgamation or gravity concentration with amalgamation of concentrate is inserted in the grinding circuit.

**7. Flotation + cyanidation of tailing.** Used for ores in which important amounts of gold are present in the nonsulphide minerals, and the sulphides are independently valuable or contain minerals harmful to cyanidation. Sulphide concentrate may either be smelted or treated (*e.g.*, roasting of arsenical concentrate) to render it amenable to cyanidation.

**8. Flotation  $\pm$  gravity concentration and/or amalga-**

**mation.** Used for ores in which the gold is associated with sulphides and may not be separated from them other than by smelting, either for economic reasons (sulphides valuable and precious metals recovered from them as an incident to smelting), or for technical reasons (removal of cyanicides too costly; gold too fine, etc.). Use or non-use of gravity concentration depends upon the size at which sulphides free, and use of amalgamation is dependent upon size of gold, its surface character with and without grinding, the nature of the sulphide associates, and the quantity of gold thus recoverable.


[3-13]

## 9. CLAY

[3-14] **Treatment.** COMMON CLAYS, such as are used for heavy-clay products, and most fire clays, will not stand the cost of beneficiation beyond the limits of selective mining, thorough mixing (and blending, if necessary), plus, possibly, crushing or screening out pebbles. Shales are crushed, pulverized, screened, and either PUGGED (wet-ground or TEMPERED) [3-15] for soft- or stiff-mud products, or they are dry-ground and dampened for semi-dry press products. BRICKS may be molded by hand, but mechanical methods are almost universal. Soft-mud bricks are wiped or pressed wet into individual molds. In the stiff-mud process, the clay paste is forced through a die as a ribbon which can be cut transversely into brick sizes, usually by a wire. Green brick rough-shaped by either process may be re-

pressed to exact dimensions, usually after partial drying. Dry-pressing is used mainly for floor and wall tile but has been adopted by many firebrick makers and is gaining ground in other branches of the ceramic industry. Although brick may be dried in the open air, modern clay-products plants have artificial driers, usually of the car-tunnel type. Various kilns may be employed for burning products; common brick may even be piled up to form their own kiln (SCOVE KILN), arched spaces being left at the bottom for the fire and the outer courses being laid close and sealed with mud to retain heat. For soft common brick, the minimum firing temperature is close to  $900^{\circ}\text{C}$ ., the average for ordinary brick being perhaps  $1,050^{\circ}$ ; for vitrified brick the temperature is higher and heating must be continued longer. Fire-clay brick are burned at  $1,250$  to  $1,400^{\circ}\text{C}$ ., and a few special products require up to  $1,640^{\circ}\text{C}$ .

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## Part E: Chart of Cases Applying the Commercially Marketable Products Rule

Case Name and Citation	Court and Date	Disposition on Appeal, Date	Products Claimed by U. S. as Base for Depletion	Products Claimed by Taxpayer as Base for Depletion	Products Finally Allowed as Base for Depletion
New Idria Quicksilver Mining Co. v. Commissioner, 2 T. C. 412	Tax Court, July 14, 1943 (Smith, J.)	Rev'd, 144 F. 2d. 918, 9th Cir., Sept. 22, 1944. (Garrecht, J., op., Mathews, J., Stephens, J.)	cinnabar ore	mercury, flaked	mercury, flaked
International Tale Co. v. Commissioner, 15 T. C. 981	Tax Court, Dec. 29, 1950 (Van Fossan, J.)		crude tale, as mined	pulverized tale in bags	pulverized tale in bags
The Black Mountain Corp. v. Commissioner, 21 T. C. 746	Tax Court, Feb. 25, 1954 (Opper, J.,) (reviewed by Court)		coal, cleaned, broken, sized, and loaded for shipment	coal, cleaned, broken, sized, loaded for shipment, and, for a portion of the coal, oil treated (to allay dust)	coal, cleaned, broken, sized, and loaded for shipment
Cherokee Brick & Tile Co. v. United States, 122 F. Supp. 59	M. D. Ga., June 4, 1954 (Davis, C. J.)	Aff'd, 218 F. 2d. 424, 5th Cir., Jan. 21, 1955 (Holmes, J., op., Borah, J.)	ground brick and tile clay before entering the pug mill	brick and tile	brick and tile
The Hitchcock Corp. v. Townsend, 132 F. Supp. 785	M. D. N. C., July 15, 1955 (Hayes, J.)	Aff'd, 232 F. 2d. 441, 4th Cir., Apr. 9, 1956 (Parker, C. J., Soper, J., Dobie, J., op.)	crude tale, as mined	pulverized tale in bags and tale crayons, packaged	pulverized tale in bags and tale crayons, packaged
Haviland Clay Works Co. v. United States, 169 F. Supp. 61	N. D. Ohio, Dec. 13, 1955 (Kloeb, J.)		ground brick and tile clay before entering the pug mill	tile	tile
Ferris Brick Co. v. United States, 51 A.F.T.R. 1116	N. D. Tex., Jan. 2, 1956 (Atwell, J.)		ground brick and tile clay before entering the pug mill	brick	brick

Case Name and Citation	Court and Date	Disposition on Appeal, Date	Products Claimed by U. S. as Base for Depletion	Products Claimed by Taxpayer as Base for Depletion	Products Finally Allowed as Base for Depletion
Cherokee Brick & Tile Co. v. United States, Civil No. 1251	M. D. Ga., Feb. 27, 1956 (Davis, C. J.)		ground brick and tile clay before entering the pug mill	brick and tile	brick and tile
Sapulpa Brick & Tile Corp. v. United States, 51 A.F.T.R. 1665	N. D. Okla., May 8, 1956 (Savage, J.)	Aff'd, 239 F. 2d, 694, 10th Cir., Dec. 20, 1956 (Phillips, J., op., Lewis, J., Murrah, J.)	ground brick and tile clay before entering the pug mill	brick and tile	brick and tile
Reliance Clay Products Co. v. United States, 51 A.F.T.R. 1649	X. D. Tex., May 12, 1956 (Atwell, J.)	Aff'd, 242 F. 2d, 708, 5th Cir., Mar. 27, 1957 (Hutcheson, C. J., op., Rives, J., Brown, J.); cert. denied, 355 U. S. 824, Oct. 14, 1957	ground brick and tile clay before entering the pug mill	brick and tile	brick and tile
Merry Bros. Brick & Tile Co. v. United States, 45 F. Supp. 186	S. D. Ga., July 3, 1956 (Scarlett, J.)	Aff'd, 242 F. 2d, 708, 5th Cir., Mar. 27, 1957 (Hutcheson, C. J., op., Rives, J., Brown, J.); cert. denied, 355 U. S. 824, Oct. 14, 1957	ground brick and tile clay before entering the pug mill	brick and tile	brick and tile
Dragon Cement Co. v. United States, 44 F. Supp. 188	S. D. Me., Aug. 24, 1956 (Aldrich, J.)	Rev'd, 244 F. 2d, 513, 1st Cir., May 14, 1957 (Magruder, C. J., op., Woodbury, J., Hartigan, J.); cert. denied, 355 U. S. 833, Oct. 14, 1957	pulverized cement rock prior to burning in the kiln	cement	cement <sup>1</sup>

<sup>1</sup>On remand, 163 F. Supp. 168 (S. D. Me., June 24, 1958) the only remaining issue was the inclusion of bagging costs in the depletion base. The court resolved this question in favor of the taxpayer.

Case Name and Citation	Court and Date	Disposition on Appeal, Date	Products Claimed by U. S. as Base for Depletion	Products Claimed by Taxpayer as Base for Depletion	Products Finally Allowed as Base for Depletion
Estate of L. L. Stephenson v. United States, 51 A.F.T.R. 1692	N. D. Ala., Sept. 26, 1956 (Lynne, J.)	Aff'd by stip., 52 A.F.T.R. 1781, 5th Cir., Apr. 25, 1957; cert. denied, 355 U. S. 824, Oct. 14, 1957	ground brick and tile clay before entering the pug mill	brick and tile	brick and tile
Tupelo Brick & Tile Co. v. United States, 51 A.F.T.R. 1717	N. D. Miss., Oct. 5, 1956 (Cox, J.)	Aff'd by stip., 52 A.F.T.R. 1817, 5th Cir., Apr. 25, 1957; cert. denied, 355 U. S. 824, Oct. 14, 1957	ground brick and tile clay before entering the pug mill	brick and tile	brick and tile
Chattahoochee Brick Co. v. Cobb, 51 A.F.T.R. 1388	N. D. Ga., Oct. 30, 1956 (Sloan, J.)	Aff'd by stip., 52 A.F.T.R. 1297, 5th Cir., Apr. 25, 1957; cert. denied, 355 U. S. 824, Oct. 14, 1957	ground brick and tile clay before entering the pug mill	brick and tile	brick and tile
Atlanta Brick & Tile Co. v. United States, 51 A.F.T.R. 1345	N. D. Ga., Oct. 30, 1956 (Sloan, J.)	Aff'd by stip., 52 A.F.T.R. 1214, 5th Cir., Apr. 25, 1957; cert. denied, 355 U. S. 824, Oct. 14, 1957	ground brick and tile clay before entering the pug mill	brick and tile	brick and tile
Kirby v. Campbell, 51 A.F.T.R. 1542	N. D. Tex., Nov. 7, 1956 (Atwell, J.)	Aff'd by stip., 52 A.F.T.R. 1513, 5th Cir., Apr. 25, 1957; cert. denied, 355 U. S. 824, Oct. 14, 1957	ground brick and tile clay before entering the pug mill	brick	brick
Elgin-Butler Brick Co. v. United States, 146 F. Supp. 378	W. D. Tex., Nov. 14, 1956 (Rice, J.)	Aff'd by stip., 52 A.F.T.R. 1350, 5th Cir., Apr. 25, 1957; cert. denied, 355 U. S. 824, Oct. 14, 1957	ground fire clay before entering the pug mill	structural brick and tile, fire brick, and negligible amount of raw clay and ground clay in bags sold in such forms	structural brick and tile, fire brick, and negligible amount of raw clay and ground clay in bags sold in such forms

Case Name and Citation	Court and Date	Disposition on Appeal, Date	Products Claimed by U. S. as Base for Depletion	Products Claimed by Taxpayer as Base for Depletion	Products Finally Allowed as Base for Depletion
Cherokee Brick & Tile Co. v. United States, Civil No. 1323	M. D. Ga., Dec. 5, 1956 (Davis, C. J.)	Aff'd by stip., No. 16,647, 5th Cir., May 3, 1957; cert. denied, 355 U. S. 824, Oct. 14, 1957	ground brick and tile clay before entering the pug mill	brick and tile	brick and tile
Teague Brick & Tile Co. v. United States, 51 A.F.T.R. 1709	W. D. Tex., Dec. 11, 1956 (Rice, J.)	Aff'd by stip., 57-2 U.S.T.C. ¶ 9745, 5th Cir., April 29, 1957; cert. denied, 355 U. S. 824, Oct. 14, 1957	ground brick and tile clay before entering the pug mill	brick and tile	brick and tile
Acme Brick Co. v. United States, 167 F. Supp. 911	N. D. Tex., Dec. 14, 1956 (Estes, J.)	Aff'd by stip., 52 A.F.T.R. ¶ 185, 5th Cir., Apr. 25, 1957; cert. denied, 355 U. S. 824, Oct. 14, 1957	ground fire clay and ground brick and tile clay before entering the pug mill	structural brick and tile, fire brick, and negligible amount of ground fire clay sold in such form	structural brick and tile, fire brick, and negligible amount of ground fire clay sold in such form
Harvey v. United States, 32 A.F.T.R. 1448	D. Ariz., Feb. 21, 1957 (Ling, J.)		ground brick and tile clay before entering the pug mill	brick	brick
Texas Vitrified Pipe Co. v. United States, Civil No. 3329	N. D. Tex., Feb. 12, 1957 No. 16,073 (Estes, J.)	Aff'd by stip., 5th Cir., May 10, 1957; cert. denied, 355 U. S. 824, Oct. 14, 1957	ground shale before entering the pug mill	vitrified sewer pipe, flue lining, and related vitrified products	vitrified sewer pipe, flue lining, and related vitrified products
Louisville Brick Co. v. United States, 1 A.F.T.R. 2d 563	N. D. Miss., Apr. 17, 1957 (Cox, J.)		ground brick and tile clay before entering the pug mill	brick	brick
American Gilsonite Co. v. Commissioner, 38 T. C. 194	Tax Court, Apr. 29, 1957 (LeMire, J.)	Rev'd in part, <sup>2</sup> 259 F. 2d 654, 10th Cir., Sept. 25, 1958 (Bratton, C. J., Phillips, J., op., Lewis, J.); cert. denied, 359 U. S. 925, Mar. 2, 1959	gilsonite, crushed and screened	gilsonite, crushed, screened, and, in the case of 10% of its production, pulverized, and bagged	gilsonite, crushed and screened, and in the case of 10% of its production, pulverized

<sup>2</sup> Tax Court reversed on including income attributable to bagging in the depletion base.

Case Name and Citation	Court and Date	Disposition on Appeal, Date	Products Claimed by U. S. as Base for Depletion	Products Claimed by Taxpayer as Base for Depletion	Products Finally Allowed as Base for Depletion
United States v. Burns Brick Co., Civil Nos. 1276, 1285, 1326, 1327	M. D. Ga., Dec. 5, 1956 (Davis, C. J.)	Aff'd by stip., 57-2 U.S.T.C. ¶ 9746, 5th Cir., May 3, 1957; cert. denied, 355 U. S. 824, Oct. 14, 1957	ground brick and tile clay before entering the pug mill	brick and tile	brick and tile
Riverton Lime & Stone Co., Inc. v. Commissioner, 28 T. C. 446	Tax Court, May 24, 1957 (Rice, J.)		limestone, crushed, and small amount of waste screenings sold as such	hydrated hydraulic lime in bags and small amount of waste limestone screenings sold as such	hydrated hydraulic lime in bags and small amount of waste limestone screenings sold as such
Elgin Standard Brick Mfg. Co. v. United States 153 F. Supp. 279	W. D. Tex., June 12, 1957 (Rice, J.)	Aff'd by stip., 1 A.F.T.R. 2d 645, 5th Cir., Dec. 4, 1957	ground fire clay before entering the pug mill	structural brick and tile, fire brick, and negligible amount of raw and ground fire clay sold in such forms.	structural brick and tile, fire brick, and negligible amount of raw and ground fire clay sold in such forms
Strickland v. United States, 153 F. Supp. 125	E.D.N.C., July 2, 1957 (Gilliam, J.)		ground brick and tile clay before entering the pug mill	brick	brick
The Lovell Clay Products Co. v. United States, 167 F. Supp. 891	D. Wyo., July 20, 1957 (Kerr, J.)		ground brick and tile clay before entering the pug mill	brick, tile, sewer pipe	brick, tile, sewer pipe
Iowa Limestone Co. v. Commissioner, 28 T. C. 881	Tax Court, July 25, 1957 (LeMire, J.)	Aff'd, 269 F. 2d. 398, 8th Cir., July 10, 1959 (Vogel, J., Sanborn, J., Van Oosterhout, J., op.)	crushed limestone	dried and pulverized limestone	dried and pulverized limestone
Acme Brick Co. v. United States, 160 F. Supp. 604	N. D. Tex., Sept. 3, 1957 (Estes, J.)		ground brick and tile clay and ground fire clay before entering the pug mill	structural brick and tile, fire brick, and negligible amount of ground fire clay sold in such form	structural brick and tile, fire brick, and negligible amount of ground fire clay sold in such form

Case Name and Citation	Court and Date	Disposition on Appeal, Date	Products Claimed by U. S. as Base for Depletion	Products Claimed by Taxpayer as Base for Depletion	Products Finally Allowed as Base for Depletion
Uteo Products, Inc. v. United States, 32 A.F.T.R. 1823	D. Utah, Oct. 24, 1957 (Ritter, J.)	Rev'd, <sup>3</sup> 257 F. 2d 65, 10th Cir., June 10, 1958 (Phillips, J., op., Bratton, J., Breitenstein, J.)	crushed and sized perlite	crushed, sized, and expanded (heated) perlite in bags	crushed, sized, and expanded (heated) perlite
Fraser Brick & Tile Co. v. United States, 32 A.F.T.R. 1391	W. D. Tex., Oct. 28, 1957 (Rice, J.)		ground brick and tile clay before entering the pug mill	brick and tile	brick and tile
Big Run Coal & Clay Co. v. United States, 1 A.F.T.R. 2d 647	W. D. Ky., Nov. 4, 1957 (Brooks, J.)		ground brick and tile clay before entering the pug mill	brick and tile	brick and tile
Murray Tile Co. v. United States, 1 A.F.T.R. 2d 646	W. D. Ky., Nov. 4, 1957 (Brooks, J.)		ground brick and tile clay before entering the pug mill	brick and tile	brick and tile
Southern Lightweight Aggregate Corp. v. United States, 1 A.F.T.R. 2d 392	E. D. Va., Dec. 23, 1957 (Hoffman, J.)		an earlier unspecified form of slate before it is processed into lightweight aggregate	lightweight aggregate made from crushed, screened, and heated slate	lightweight aggregate made from crushed, screened, and heated slate
Northwest Magnesite Co. v. United States, 1 A.F.T.R. 2d 1405	E. D. Wash., Mar. 6, 1958 (Driver, J.)		magnesite ore after concentration	dead burned magnesite (burned in a kiln), crushed and sized	dead burned magnesite (burned in a kiln), crushed and sized
Arvon-Buckingham Slate Co. v. United States, 167 F. Supp. 903	E. D. Va., Mar. 26, 1958 (Hutcheson, C. J.)		unprocessed slate as quarried	roofing slate shingles, flagstone, rubble	roofing slate shingles, flagstone, rubble

<sup>3</sup> District Court reversed on including income attributable to bagging in the depletion base. This was the only issue on appeal.

Case Name and Citation	Court and Date	Disposition on Appeal; Date	Products Claimed by U. S. as Base for Depletion	Products Claimed by Taxpayer as Base for Depletion	Products Finally Allowed as Base for Depletion
Monolith Portland Cement Co. v. United States, 168 F. Supp. 692	S. D. Cal., Apr. 14, 1958 (Mathes, J.)	Modified <sup>1</sup> and Aff'd, 269 F. 2d 629, 9th Cir., July 2, 1959 (Hamley, J., op., Chambers, J., Jertberg, J.)	pulverized limestone	cement	cement
Cordell v. Scofield, 1 A.F.T.R. 2d 1853	W. D. Tex., May 27, 1958 (Rice, J.)		ground brick and tile clay before entering the pug mill	brick and tile	brick and tile
Cannelton Sewer Pipe Co. v. United States, 2 A.F.T.R. 2d 5277	S. D. Ind., June 25, 1958 (Holder, J.)	Aff'd, 268 F. 2d 334, 7th Cir., June 15, 1959 (Duffy, C. J., Hastings, J., op., Knock, J.); cert. granted, 361 U. S. 923, Dec. 14, 1959	raw fire clay and shale or ground fire clay and ground shale or common brick	vitrified clay sewer pipe, flue lining, related vitrified products, and negligible amount of ground fire clay in bags sold in such form	vitrified clay sewer pipe, flue lining, related vitrified products, and negligible amount of ground fire clay in bags sold in such form
Elgin Standard Brick Mfg. Co. v. United States (unreported)	W. D. Tex., July 15, 1958 (Rice, J.)		ground fire clay before entering the pug mill	structural brick and tile, fire brick, and negligible amount of raw and ground fire clay sold in such forms	structural brick and tile, fire brick, and negligible amount of raw and ground fire clay sold in such forms
Riverside Cement Co. v. United States, 2 A.F.T.R. 2d 6175	S. D. Cal., Sept. 30, 1958 (Mathes, J.)		crushed limestone	cement in bulk and in bags	cement in bulk and in bags
Pacific Clay Products v. United States, 3 A.F.T.R. 2d 873	S. D. Cal., Oct. 30, 1958 (Holland, J.)	Pending, 9th Cir., No. 16,401	raw fire clay, and raw brick and tile clay	sewer pipe, flue lining, fire brick, related clay products, and small amount of ground and bagged fire clay	sewer pipe, flue lining, fire brick, related clay products, and small amount of ground and bagged fire clay

<sup>1</sup> Modified on other issues.

Case Name and Citation	Court and Date	Disposition on Appeal Date	Products Claimed by U. S. as Base for Depletion	Products Claimed by Taxpayer as Base for Depletion	Products Finally Allowed as Base for Depletion
Richland Shale Products Co. v. United States, $\Delta$ 168 F. Supp. 731	E. D. S. C., Oct. 31, 1958 (Timmerman, J.)		common brick and 4-inch drain tile	face brick, sewer pipe, drain tile, flue linings, wall copings	face brick, sewer pipe, drain tile, flue linings, and wall copings
Sparta Ceramic Co. v. United States, 168 F. Supp. 404	N. D. Ohio, Nov. 12, 1958 (Weick, J.)	Pending, 6th Cir., Nos. 13,838, 13,839	ground clay and shale before entering the pug mill, or common brick or unglazed tile	glazed and unglazed tile, mounted and packaged for shipment	unglazed tile, mounted for shipment
California Portland Cement Co. v. Riddell, 3 A.F.T.R. 2d 438	S. D. Cal., Nov. 21, 1958 (Mathes, J.)	Pending, 9th Cir., No. 16,438	crushed limestone	crushed and screened limestone, paving dust (fines), lime, cement clinker, and cement, in bags and in bulk	crushed and screened limestone, paving dust (fines), lime, cement clinker, and cement, in bags and in bulk
Centropolis Crusher Co. v. Bookwalter, 168 F. Supp. 33	W. D. Mo., Dec. 5, 1958 (Smith, J.)	Aff'd, 272 F. 2d 391, 8th Cir., Dec. 15, 1959 (Gardner, J., op.; Vogel, J., Mathes, J.)	limestone, crushed and sized	limestone, crushed and sized, and, in the case of 20% of its product, finely ground, in bags and bulk	pulverized limestone, crushed and sized, and, in the case of 20% of its product, finely ground, in bulk
Eastvale Clay Products Co. v. United States 4 A.F.T.R. 2d 5581	W. D. Pa., July 8, 1959 (Marsh, J.)	Pending, 3rd Cir., No. 13,090	raw fire clay	structural brick and tile, fire and ladle brick, and negligible amount of ground and bagged fire clay sold in such form, or ground and bagged fire clay	structural brick and tile, fire and ladle brick, and negligible amount of ground and bagged fire clay sold in such form
Standard Clay Mfg. Co. v. United States, 176 F. Supp. 590	W. D. Pa., July 8, 1959 (Marsh, J.)	Pending, 3rd Cir., No. 13,089	raw fire clay	structural brick and tile, fire and ladle brick, and negligible amount of ground and bagged fire clay sold in such form, or ground and bagged fire clay	structural brick and tile, fire and ladle brick, and negligible amount of ground and bagged fire clay sold in such form

Case Name and Citation	Court and Date	Disposition on Appeal, Date	Products Claimed by U. S. as Base for Depletion	Products Claimed by Taxpayer as Base for Depletion	Products Finally Allowed as Base for Depletion
Victorville Lime Rock Co. v. Riddell, 4 A.F.T.R. 2d 5463	S. D. Cal., July 27, 1959 (Mathes, J.)		crushed limestone	pulverized limestone in bulk and in bags, and incidental production of coarser sizes sold as such	pulverized limestone in bulk and in bags, and incidental production of coarser sizes sold as such
Dixie Fire Brick Co. v. United States, 4 A.F.T.R. 2d 5368	N. D. Ala., July 30, 1959 (Lynne, J.)	Pending, 5th Cir.	crude fire clay	ground fire clay in bulk and in bags	ground fire clay in bulk
Albin C. Halquist v. Commissioner, 33 T. C. 304	Tax Court, Nov. 25, 1959 (Drennen, J.)		crushed stone, or rough uncut stone	crushed and broken stone, flagstone, dry-wall stone, finished dimension stone	crushed and broken stone, flagstone, dry-wall stone, finished dimension stone
Monolith Portland Cement Co. v. United States, 60-1 U.S.T.C. ¶ 9187	S. D. Cal., Dec. 23, 1959 (Mathes, J.)		crushed limestone	cement	cement

Note: *Texas Carbonate Co. v. Phinney*, 3 A.F.T.R. 2d 1019 (W. D. Tex., Mar. 24, 1959), has been excluded because the only issue was bagging. The issue was resolved in favor of the taxpayer.